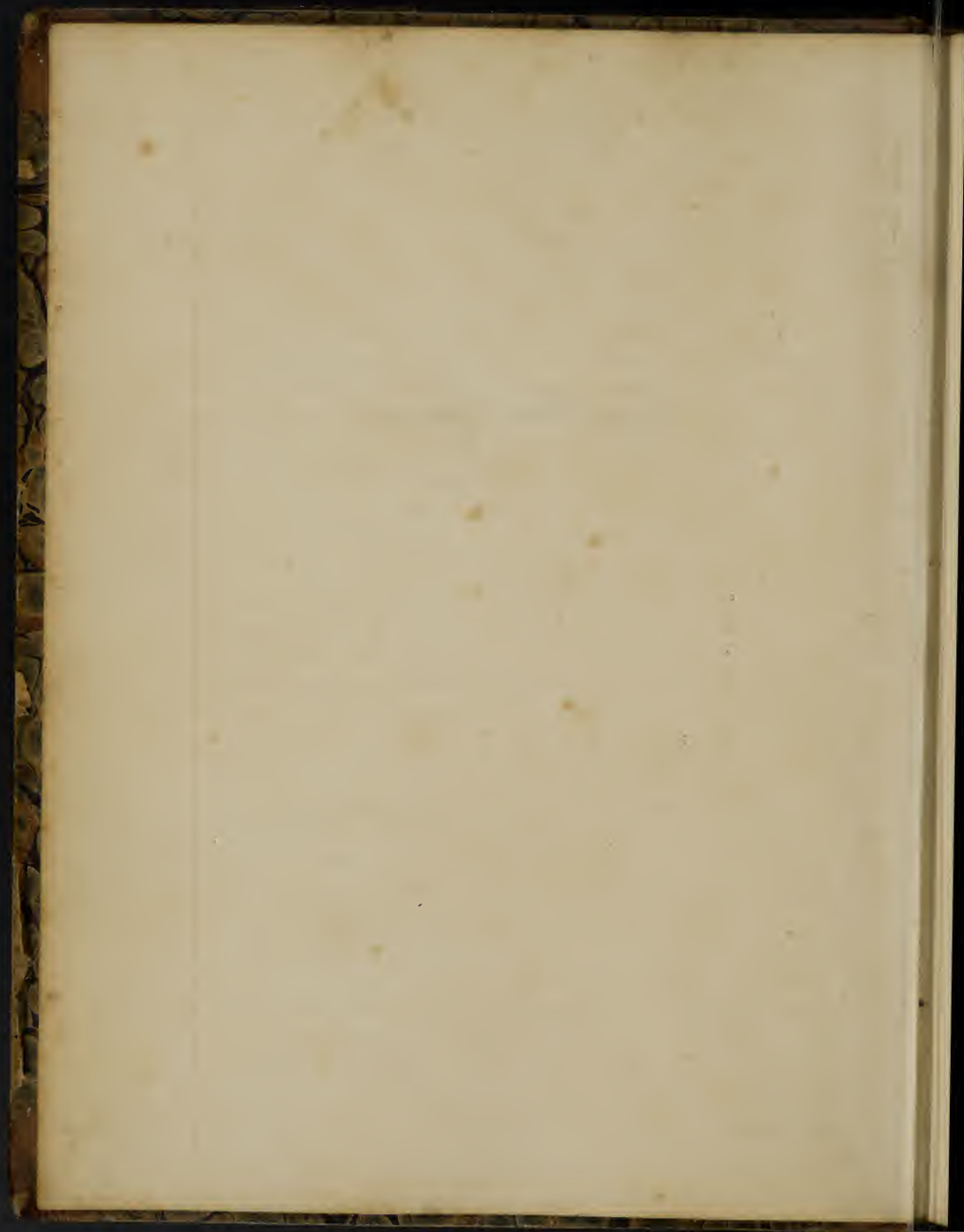
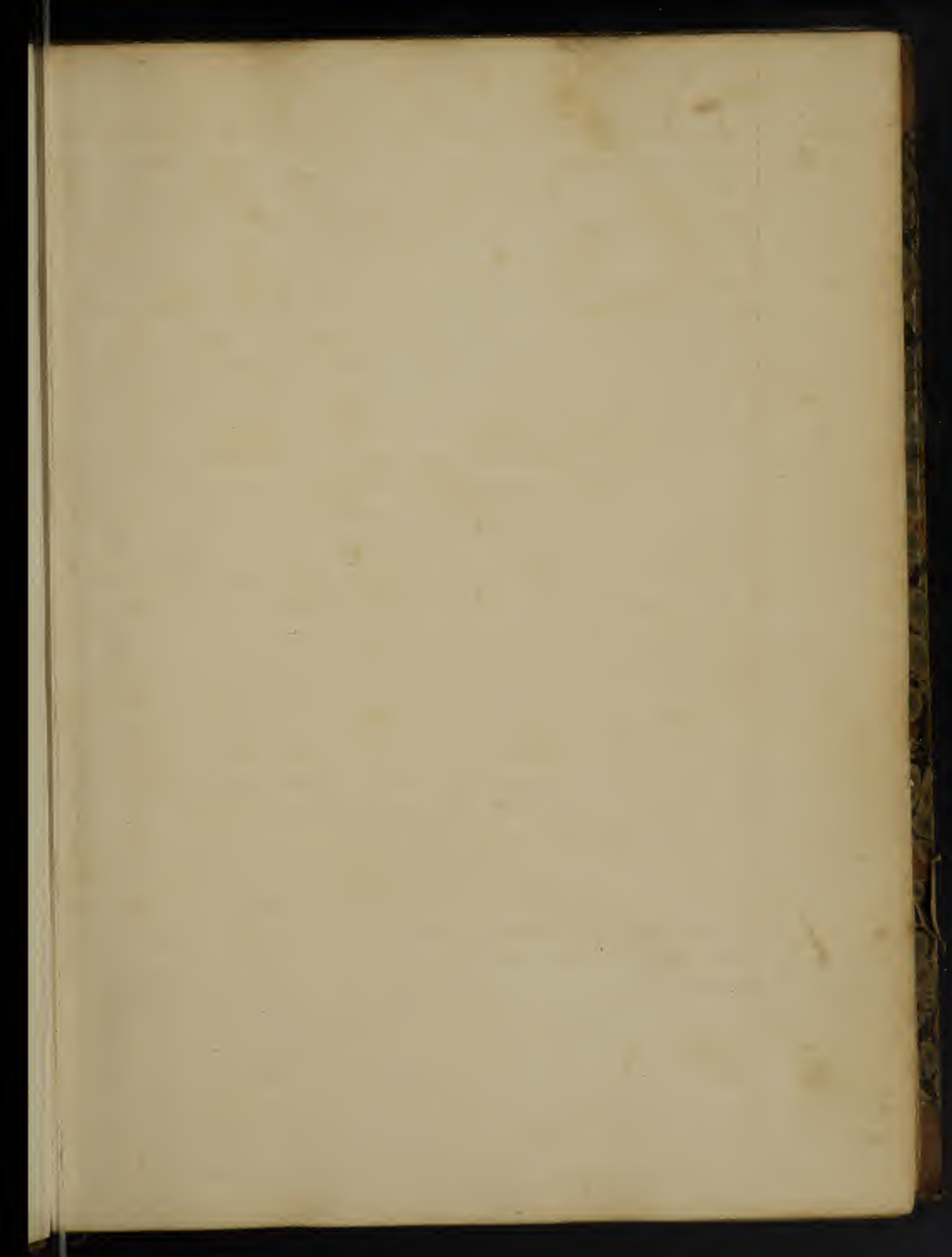
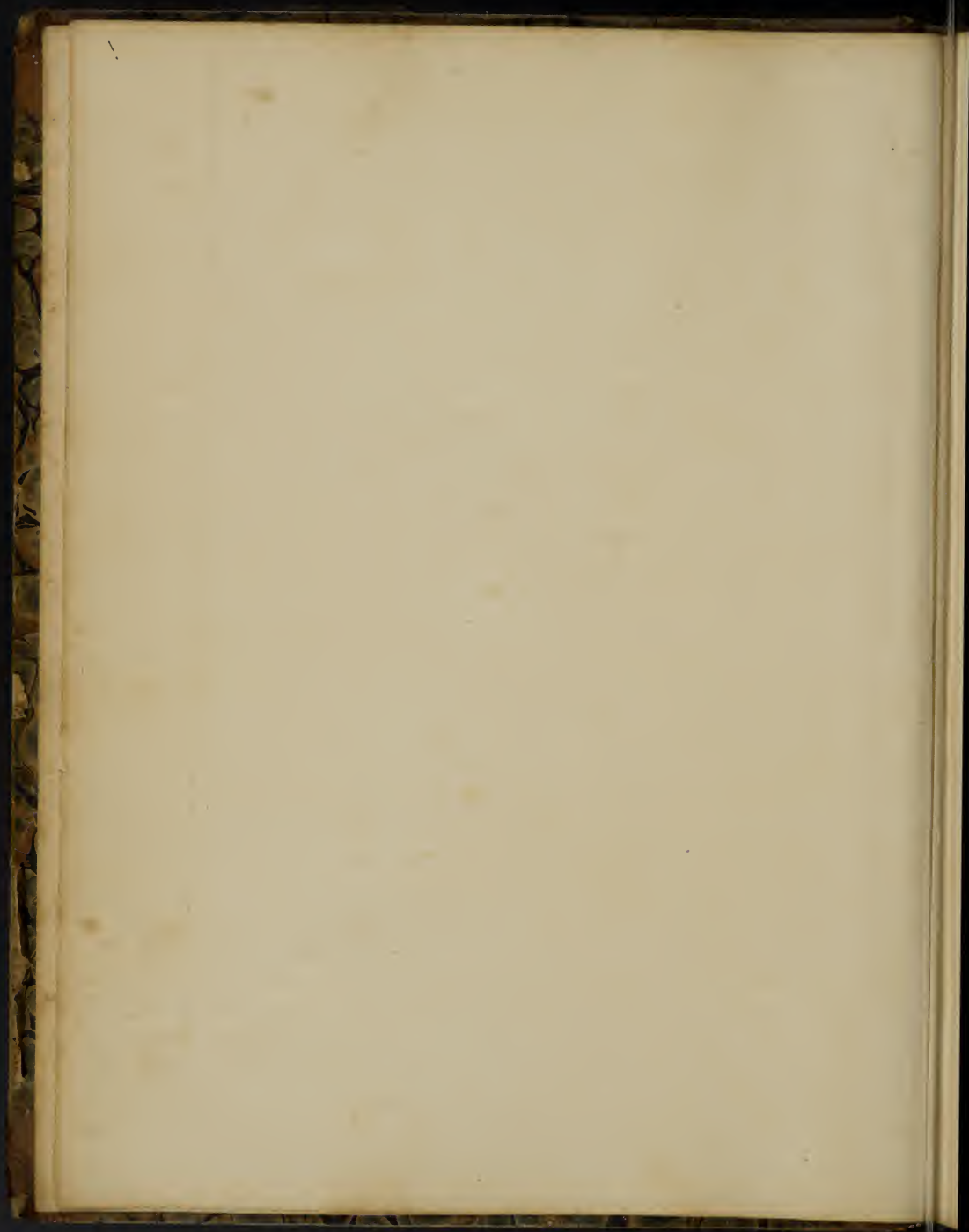


Vol 306

Origen Stans Seymour?







Real Property (Ch. 19).Devise.

This is the last mode of alienation
which I propose to consider

This title comprehends great variety of
learning

A devise is a mode of alienation &
is a testamentary disposition of real property *Pon. D. 13*
or a disposition of real property to take effect *Bac. abo*
after the death of the owner. *Will p. 497*

The term 'will' includes generically
the disposition of real & personal property

A testament is a disposition of personal
property to take effect on the death of the
owner.

A will in its strict sense is the *See 142*
appointment of an executor it is not necey *Bac. will*
to a will that any property be disposed
of. — If to the appointment of an ex'or is
superadded the disposal of personal property
the instrument is called a "will & testament"

The right of devising real property *2 Bl. 57. 375*
is said to have existed among the anglos *Pon. D. 143*
saxons. but was abolished entirely in the
feudal system. for the same reason which operated
to prevent alienation inter vivos operated to prevent
alienation by devise —

(2)

Devises

Pont. 6.

2 Bl 374

Terms for years & chattel int^{ty} generally as well as personal property might have been devised during the feudal system -

76078

Pont. 2243

2^d whether a term for years could be devised de novo or created de novo by devise

2 Bl 375-

Pont. 5. 613

236.

60 Litt 1110

The suspension of the right of devising real property continued to the time of Henry 8th tho' this restraint was evaded by the doctrine of uses. However during the greater part of this time. For the chancery of that time held that tho' a legal estate in land could not be devised yet the use of land might be devised. This practice was stopped by the st of uses. Only five yrs after this st the st of devise was enacted this st provides that all persons having a sole estate in fee simple ^{or in fee simple} or in coparcenary or tenancy in common in lands tenements & heredit^y might devise two thirds of those held by military tenure & the whole of those held in socage ^{by devise in writing}. This stat is explained 34404. Henry 8th

2 Bl 375

Pont. 140:1

216-218.9

This is what is called 'the stat of wills'

Pont. 42.10,

2 Bl 77.375

And as by st 12 Car 2^d all tenures were converted into common socage except copyhold all lands in wh^{ch} there was a fee simple might be devised except copy hold from the time of this statute.

Certain mode of making devises was Devises.
 provided by 29 Car 2. the st of frauds & perjuries. Power of devising.
 This st provides the solenities
necessary to a devise.

Our st authorizing devises is similar
 to Henry 8. but extends the right further.
 the words of our st are "all lands & other
estates" may be devised by devise in writing &c.
 The exception in the revision of 1821 is that all persons of sound
 of the age of 21 of sound mind &c shall have power to dispose of Tit 32. c. 1
 their real estate. We have also a st similar to
 the devising clause in 29 Car 2 & therefore st bount
 constructions given in England to their stat Tit 32. c. 1. 52
 are generally considered here as law.

The power of devising then in Engl? Pow 47. 8
 depends on the st of devises 32 Hen 8th as ex 2 Bl 376.
 plaind by 34th Henry 8. & the mode is regulated
 by the devising clause in 29 Car 2.

The power of devising in this state
 depends on a statute similar to that of Hen 8th
 st bount Tit 32 c. 1.

And the mode of making devises
 depends upon a statute similar to 29 Car 2. (st bount
 Tit 32. c. 1. 52 & onward)

(4)

Devise under the Statute of Henry 8th.

A devise under the st Hen 8th is called an 'irregular instrument in writing'

Dono 377:9 the devise be in writing Hence under this
Pow. 12-14 it was determined that any writing
48. manifesting an intention to make a
testamentary disposition of real property if
not contrary to the rule of law should be
considered a devise. An intention contrary to the
rules of law cannot be effected even by devise, as
an intention to create a species of estate
unknown to the law.

An instrument then in the form of
3 Hel 310 a deed & tho' actually delivered as a deed may
1 Mo. L 117 yet operate as a devise. if it appears on the
face of it to be a testamentary disposition

Belden & Carter 4 Day. Let as I remarked on escrows if a
deed is delivered to a third person purporting
to be a deed in presenti tho' to be d^o on the
death of the grantor this will be no devise but
an escrow. To make such instrument a devise
it must on the face of it appear to vest the property
on the death of ^{they make} it. Again a devise may be written at diff^t
Pow. 17- times on diff^t sheets of paper whh need not be
1 Show 548 connected together & all then will constitute
553. one devise if such appears to be the intention
1 Bun 548. of the testator
Campb 174.

And one may make several distinct, ^{Devise under 168d}
dispositions of the same subject in diff. insts in Bro 721
the same subject at diff. times - 1 Ves 187

Thus, if a devisee leaves land in fee simple Pont 18:7.537
to A. afterwards he devises to his wife a life estate 540. 624:27
in the same state this last is a revocation of Comp 87.
the first devise pro tanto & is the same in effect as 3 PM 2451
if he had devised to wife for life remainder to A.

but when there are two successive 2 Atk 208
testamentary instruments the latter may alter
restrain & modify the former for in devises the
last clause governs & the last devise takes effect
in preference to a former one - Pont 19:20

And a devise may by referring to 1 Ves 117
another instrument make that instrument a 2 Atk 273
part of itself for the purpose of explaining the 1 PM 530
testator's intention - Ex I devise all the land 2 Ves 228
described in a certain deed - This deed becomes, Pont 48:9.
a part of the devise for the purpose of ascertaining
the lands. -

After a devise is made & published the testator 2 Ves 242
may make any number of codicils by which he may 1 Ves 187
explain or alter to the original devise & Pont 23:543
the law annexes the codicils to the first devise
making them all one will. or instrument. this supposes
that the codicil refers to the will

A codicil, is an appendage to a will restraining altering
it. & A codicil always relates in whole or in part
to the same subject matter as the original instrument.
If it does not in strictness it is no codicil.

A codicil always supposes a previous will con-
plete in itself & already executed, ^{according to the statute,} If one to day
makes a devise of one piece of land & to morrow of another
piece of land these instruments are distinct devises &
the latter cannot be called a codicil,

(6)

Devise under 68. In the construction of 32 & 48 It was held that
2 Bl 376. every devise must be entirely in writing but
bro E 100 the word writing was used in its most extensive
Pow 256. sense as including loose notes, memoranda, letters
3 Lev 113. &c.

It was likewise held that the devise must be
Pow 289. completely reduced to writing during the devisors life
3 Co 31.6 otherwise not good
1 Skin 72

And it was determined that a devise might
be good in part & in part void (as if the
direction to the scrivener from the deviser was
1 Keb 880 to make an absolute gift & he with authority
Pow 30 annexed a condition. The condition only was
Dyer 72 (n 2). void & the gift good). This indeed may now in some
cases be law. And the same w^d be the rule now
But if the scrivener was directed to make
a devise on condition & it was written with
condition. It was held that the whole devise was
void. - This case is undoubtedly now law.

And under this it was held that any
3a 2. Ke 628 writing the name signed or sealed & the in
Pow 312 the hand writing of another yet if one witness
1 Sid 315. could be found to attest such devise, such writing
2 Rem 35 was a good devise. And it is said that the testator's
3 Do 79. name need not appear at all in the writing -
& descision to this effect occasioned the
devising clause in the 29 Bar 2.; which prescribes
the solemnities necessary for a devise.

(ny.)

Devise under the Stat of 1684

What interests or estates are not devisable,
It was formerly held that contingent interests 3 Lev 427
could not be devised. as contingt remainder & executory frame 291
devises. ————— Pal 34

The principle of this rule was that as
a devise was a species of alienation & since these
interests could not be aliened so the judges held
that it could not be devised —

But it is now clearly established that 1 Bl 122
such int^s may be devised, as a contingent 14 Bl 30
remainder before the contingency happens may be 1 Fon 6203:9
devised & upon the contingency happening the 32 L 88:90
devise may take effect. But a naked possibility 45 R 248.
cannot be devised as a contingt power over another's Pow^t 34. 234. 497
land — For such interest cannot be devised when not 600 22 am 44:14.
contingt But on the other hand a contingency
not coupled with an int^e is not devisable (16)

that is a bare authority depending on a
contingency over the estate of another is not
devisable indeed a bare authority is never
devisable except by express provision in the
instrument creating the power,

An estate turned to a mere right is not devisable (281. 317)
thus if the owner of land has been (243. 405)
ousted the not barred by the st of limitations, Pow^t 35. 6. 611
he may not devise such land. The rule
here respecting devises follows the rule respecting alienation
by ded.

(8) What Estates are not devisable?

An estate per autre vie is not devisable
60 E. 58 under H. 8. for then it comprehends only estates
60 Litt 41 in fee. but it is real estate & therefore not
3 Keb 480. devisable at common law.

1 Ves 428. Pow. 36-38. 218.

But by 29 bar 2^o estates per autre vie
2 Bl 259. 60 are made devisable unless as some qualify
Pow. 37-40 the rule there is a special occupant named
that is unless the estate per autre vie is limited to
a man & his heirs.

But according to others in either case it
is devisable. and this appears to me to be the
correct opinion.

But one it seems clearly to authorize the
devise of estates per autre vie. for the ex-
pression in our statute are 'all real estates'
will seem to include all estates to which
some other person has not a paramount right &
which may continue after the death of the owner.

36. 82. 6

10. 60. 51

Pow. 40. 1

Dignities offices & franchises are never dev-
isable tho' in many instances descendible.
Now a peerage is descendible but never devisable

In Count &c. they cannot be devised
for they are not even descendible. & they are not
real property—

Pow. 10. 45. 6

Coppy hold. lands being omitted in the statute
are not devisable. They may however be indirectly
devised by surrender to the use of the owner's will &c

3d right of entry on lands depending on the non performance of a condition by the grantor is not devisable. - The grantor has no interest in the lands until the condition is broken - 1 Ves 223 422. Pow 46 183

If it is asked why this right being similar to a contingent trust may not be devised as well as a contingent interest, Answer - The benefit of a condition is personal to him in whom favour it is made & to his representatives & a devise therefore could not take advantage of the condition. 2 Bl 155.6 Pow 46.

The Devise itself

The clause in 29 Car 2^d is that all devises of lands tenements &c shall be in writing. 2 Bl 376
 2^d That the devise shall be signed by the devisor or by some other person in his presence & by his express direction. Pow 47.8
 & 3^d It must be subscribed by three or more credible witnesses in the presence of the testator.

But it counts upon devising as already existing in the law & for that reason it would appear to be defective. (this is the case in the old statute) but in the revision of 1821 it is altered see next page -

(10.) Solemnities requisite for a Devise.

Our statute is almost precisely the same as 29 Car 2^d. It prescribes 1^o That all wills shall be
It bound in writing. 2^o subscribed by the testator. 3^o
Tit 32. c. 1. s. 2. that no devise of real estate contained in any
will or codicil shall be good unless such will or
codicil shall be attested by three witnesses all of them
subscribing in the presence of the testator.

The object of these provisions in these it is to
guard men in extremes ag^t frauds & to protect
the heirs. It is a presumption of law that
devises are made in extremes

Pow 419 The first provision then is that devises shall
be in writing but no form is prescribed
& therefore any form wh^{ch} w^e have been good
under the st of H. 8. will now be good if the
solemnities of the st of frauds are observed
so the writing may be in the form of a letter
a memorandum. &c.

Hence as under the st of wills so under this
st. frauds any instrument executed correctly
2 Atk 413 may by referring in terms to another
274. 368. instrument may make that instrument a
1 P 171⁴³ part of itself even tho the former instrument
3 Bun 1775 or the instrument referred to is not executed
Pow 419. 48. according to the statute of frauds. thus
2 Atk 274 if A makes a devise conveying his land with the
378. part of his heirs if this devise is duly executed if
the afterwards dies seised by an instrument not
executed according to 29 Car 2^d yet these legacies the
they charge the land & will be good

What interests are included in the st reg car (11.)

The next words are "of any lands or tenements" in our st the words are "real estate" - This is descriptive of the subject matter on which the devise is to operate.

Now under this clause it has been decided 20 Wm 75 that this st does not extend to such colonies ^{1 Tucker's} as were planted before the ~~statute was enacted~~ ^{statute was enacted} ~~colonies were planted~~ ^{statute was enacted} 132 382:93 & this is a good principle viz that statutes made ^{before} 204 before a colony emigrate from the parent country are prima facie ^{Salk 411} the law of the colony. This is the doctrine which has been 132 106:8 adopted in England & which has been adopted by the ^{Pow 52} about purely in this country viz that the statutes made ^{in the parent country} before the emigration are prima facie the law of the colony. Those made after are not -

But a devise executed in another country 20 Wm 291 of land lying here must be executed according ^{Pow 52:3} to our law. Thus if a citizen of the US makes 14 B 690:1 a devise of land ^{lying here} in France the devise must ^{Amb 25 416} be made according to the statute of this country. And if a man in Conn & being a citizen of this state makes a devise of land ^{lying} in Vermont the devise must be executed according to the law of Vermont. Lex loci sitae always governs in the devise of real property & indeed always governs the disposition of real property.

Such is not the rule respecting personal property such py has no locality, 11

But the words lands & tenements in the st does not extend to any chattel interests as terms for years &c. for these are governed by the common law so that a term for 1000 years may be devised with the solenmities required by 29 Conn

Pow 55

Gibbs R 164:72

(12) What subjects are within 29 car 2^d?

But a trust of inheritance is within
3 Atk 152 the statute. for instance an equity of
2 PM 285 redemption is devisable & must be devised
Pon 258. with all the solemnities required by 29 bar 2

Again if a holds an estate in
trust for B B may devise his trust but it
must be devised with all the solemnities required
in the devise of a legal estate.

And an appointment of land made by
1 PM 740 will under a power must be made by a
2 PM 285 will executed according to the statute. Thus
2 Ves 179. an estate is conveyed to trustees in trust for
Pon 489 such persons as A shall by his will appoint
38. 150. now the will or appointment must be
executed according to the devising clause
in the statute of frauds

And if a legacy is given originally out
2 Atk 268 of land the will creating this charge must
285. be executed according to the statute as
Pon 59 if a man wills thus I give to J. S. £1000
to be raised out of my real estate this
is a disposition of real estate pro tanto &
therefore to be executed according to the
statute. This is diff^t from the case
stated before of a legacy referred to in a
devise -

And rent issuing out of land is within the statute & a devise of freehold rent must Pon 59 be executed according to the statute - Rent is the reservation of part of the profits of the land they therefore partake of the nature of land

And a will giving the power to sell land 212 179 must be thus executed. for this is inducely Pon 59 disposing of the land. for it is giving to others a power to dispose of lands.

With regard to the solemnities.

1st The devise must be written, this obtains under our law. Pon 15. 6. 60.
2^d that it be signed by the testator or by some other person in his presence & by his express directions.

The words of our St are that it shall be subscribed by the testator. omitting the clause 'or by some other person in his presence &c -

Sealing is usual in this state & in Engl Pon 66. 76 but it is not necessary either here or in Engl Corp 264. for the St is silent & the common law has Silt Eq R 261. nothing to do with devises for they are created by statute.

(14) Devises. What amounts to signing within eq car?

It was formerly held in Eng^l that sealing alone by the testator with signing
3 Lev 1 on the principle that sealing amounted
3 Sells 219 to signing within the meaning of the Stat.
2 Stra 764 But it has since been decided that
1 Milon 313 signing is necessary & this appears to be the
Pow 62.67 correct opinion for it is much more easy to
74. counterfeit a seal than a signature & these solemnities
1 Vesf 13-15 were required chiefly to guard ag^t this kind of fraud
17 Vesf 459.

But what amounts to signing? the name
3 Lev 1.36 of the testator written by himself in any part
3 Sells 219 of the instrument is construed a signing unless
1 Cy 2403 it appears that it was not intended as a
Pow 61-66 signing - In w^h this ever be suff^t under our Stat -
18 Vesf 183. In. suppose the testator's name is written in the commencement
1 Vesf 11. of the devise by himself but the whole instrument is
not in the hand writing of the testator? 2 Bl 377 b.

But when it appears that the name of
Long 229 the testator the written by himself in the body
24 of the instrument was not intended as a signing
1 Don 618c then the devise will not be good as when the
Pow 65.6 testator manifested an intention to sign the
devise in form it was held that his writing his
name in the body of the instrument was not a
suff^t signing.

But when the testator's name is written in the body of the instrument by himself & there Pont 65:6. is no other signing the onus probandi lies on the party objecting to the sufficiency of this signing.

1202 L. 11.

The next requisite is that the devise must be subscribed & attested by three or more credible witnesses.

In our statute "shall be attested by three witnesses all of them subscribing in the presence of the testator."

Now the attesting witnesses are to attend principally to three objects. the sanity of the testator. the signing of the testator & the publishing the will by the testator. 30 M. 93 2 Atk 56

They are to attend to the sanity of the testator for the signing contemplated by the Bul. & 264 statute is not merely the physical act of signing but a legal signing to which sanity is necessary. Pont 69:70 Bul. & 264 1 Bl. R. 365 1 Burr 417 Pont 113:6.

When a devise then is offered to a C of probate or to a C of justice on a question of title the devisee must prove the sanity of the testator. The burden lies on those who claim under the devise - This is diff. from the rule in case of deeds - The maker of a deed is presumed to be compos but the maker of a will is presumed to be in extremis, 2 Atk 56. Bull 264 1 Bl. R. 365. Pont 69:70.

16
But the testimony of the subscribing
witnesses is not conclusive as to the sanity
of the testator. the signing of the testator
or their own signing. whatever the subscrib
ing witnesses may testify it may be contra
dicted on either side.

Real Property Verbo

Devises.

It is not indispensable that the witnesses 3 Lev 1
sh: have actually seen the testator sign. an acknowledgment Rec in C 184
by him to them that the name appearing in the will was 2 PM 4506
written by himself is sufficient. 3 PM 253

2d Is a will attested by three witnesses unless 2 Ves 455
they see the testator sign or hear him acknowledge & Doug (232 244.)

But the testator's saying 'this is my will' is not 2 Atk 182
sufft evidence of signature. This is not an acknowledgment Pont 73
ment at all that the testator signed the will.

3d proof of hand writing be resorted to in such case?

It is said however that a written declaration bony 2 147.
in the hand writing of the deviser that his name was in Pont 76:8
written by himself is sufft evidence of the fact of his 3 PM 254
signing. This appears to J & I extremely questionable
How can this hand writing be better evidence
of the signing than, the hand writing of the signature
itself?

The third thing to which the witnesses are to attend Bath 156.
is the publication this is a com: law requisite Pont 80:1
the act of publication of a will or devise is
tantamount to a delivery of a deed.

By the publication of a will is meant Pont 81
some declaration or some act of the testator
amounting to a declaration that the instrument
is his will but there is no established form
of publication but any act or declaration by
the testator importing an intent in the testator to dispose
of his estate (by that instrument) is sufft

And hence delivery of the instrument as a deed Burn 4vo 117
to a depository is considered as a constructive Pub
publication. & it was even held that this
was so when the witnesses were decessed with respect
to the character of the writing by the delivery.

Devises

(11)

2n. 12.0

The declaration 'this is my last will' is clearly a suffe publication & this is the usual form -

And a publication may be inferred as when the form of attestation is in the testator's hand writing to this effect "Signed & published in the presence of these witnesses, And this expression" take notice"

4 Burr 114

Comy 2351

Pon. 664

The jury may presume from the fact of the will being signed by the testator that the witnesses have taken notice of the publication.

But the publication whatever it is must be in the presence of three witnesses, this precise point has never been adjudged but it has been decided that a republishing must be in the presence of three witnesses. They are not attesting witnesses unless they hear or see what amounts to a republishing.

It is necessary to the validity of a devise that the whole instrument be present at the attestation of the witnesses. they are to attest the devise but if half of it is present & half in another place they attest only half of the devise.

1 Eq. ca 403

3 Moll 268.

Pon. 57.

3 Burr 1772

1 Bl. R. 407.22

454.

Pon. 57.8.

But unless there is positive proof that the whole will was not present the jury may presume that the whole was present for whether the will was or was not present is a matter of fact for the jury to determine from the circumstances of the case -

3 Burr 1775

2 Bl. 377

1 Burr 540.

R. u. C. 185.

270.

6 Auth 37

Pon. 59.101

108 682.

It is held that if a devise is made on three sheets of paper & each witness subscribes one of the sheets this is suffe even tho' the sheets are unconnected. This rule supposes the whole will to be present when each of the witnesses subscribe as before & it is not material in what part of the devise the names of the witnesses are subscribed.

(19.)

Witnesses must subscribe in the presence of the Testator

Mr. Pout says that if the several parts of a will are unconnected & wrapped in a blank cover the subscribing the names of the witnesses on that blank cover is a suffo attestation of the devise but this rule is very questionable. - The wrapper may have been opened & an entirely new will substituted

The st requires that the witnesses subscribe in the presence of the testator. These words are in construction synonymous with "within his possible view". If then the testator is where he might have possibly seen the witnesses subscribe this is held suffo thus if the testator is in a bed with the curtains drawn & the witnesses subscribe in the room when by putting aside the curtains he might have seen them this satisfies the rule. So also when the testator was in a carriage near the door of an attorney's office & the witnesses subscribed the will in the office & it was known that the witnesses might have been seen from the carriage -

This provision is intended not only to prevent fraud by the substitution of a false instrument but to prevent any mistake as where a testator has provided several wills. -

But the subscription of the witnesses tho' in a contiguous apartment yet in such a situation that they could not be seen by the testator this is not suffo not even if they retire to the other apartment by the express direction of the testator -

2 Bl 377
Salp 399 395
686.
Baith 81
Pout 90
1 Eg. ca 403
Dong 232
2 Bl 377
1 Br 64 99
Gru 70.
Pout 92

Baith 79
Gamb 176
Holt 222
1 P M 239
Dong 232
2 Bl 377
Pout 95

Devises

Doug 229

or 241.

Pout 96.

2 Bl 377 & n

And this requisite requires a mental presence if therefore he is in an insensible state during the attestation the devise is not good even tho' it was signed by him while he was in sound mind

17 M 740

Pout 95

It is clear from these rules that the subscription by the witnesses were done in the room where the testator is yet if done in a clandestine manner the subscription will not be good—

Comy & 531

Stok 1109

Buller & 264

Pout 95:9.

The fact that the attestation was in the testator's presence need not appear on the face of the instrument tho' this is the usual form. & tho' this is stated in the instrument yet it must be established as a matter of fact either by direct proof or presumption. This is in its nature an extrinsic fact.

If the witnesses are all dead the fact of the subscription is suff^{ce} presumptive evidence that it was in the presence of the English stat^{ute} this attestation must be subscribed by three or more credible witnesses. in the construction

Smith 35

Comb 174

Pout 10040

650. 652

3ellod 263

Rec in Ch 270

Art 742

of this part it has been determined that if a devise is made & subscribed by two witnesses & a codicil made attested by two yet this is not a suff^{ce} attestation to pass real estate either by the codicil or the first devise

Again if an original devise is not duly witnessed by three a codicil duly attested with three witnesses. the original devise is not made good by the subscription to the codicil. But if two devises are made at different times as to several distinct parts of the testator's property & not attested until the whole is completed the two parts will be considered one will & the attestation of the latter will give validity to the former. ^{The reason I take to be this} a codicil is made to affect an instrument already complete and not to consummate or give validity to the original instrument. if it is made for this purpose it is no codicil but a part of the original devise.

2 Vern 577
Pout 600:2
Comyn R 384
1 Burr 457. 552
Pout 108. 9. 536

But where there is a codicil on the same sheet or paper ^{with the devise} the question whether the subscription was intended for one or for both is a question of fact for the jury.

Comyn R 197
Pout 106.

And the question whether a subsequent writing is a codicil or a part of the original ^{devise} ~~will~~ is thus decided. If the subsequent writing disposed only of personal estate & is attested by three witnesses the subsequent writing is considered as a part of the original devise & not a codicil for it was considered as a codicil the attestation of three witnesses was unnecessary. & therefore the subscription by three witnesses is a proof that the testator intended the writing for a part of the original devise & not a codicil. If the subsequent writing disposed of real property the presumption is that the attestation was not intended for the former writing.

1 Burr 554. 5
Don 409.

Devises

It is not indispensable that the witnesses
 3 Burr 1775 subscribe in the presence of each other or at
 2 Vern 429 the same time. No they must all subscribe
 Rec in Ch 134 in the presence of the testator.

2 Atk 177

1 P Wms 741

1 Fox 184

1 Blk 365

4 Burr 2224

Bulwer 264

Pow 708.

But it is altogether the most safe mode
 for them to subscribe in each other's presence
 for unless they do one of the witnesses cannot
 testify to the subscription of the others

Now in a question of title at law
 one witness is sufft if he can testify that
 the others subscribed in the presence of the
 testator.

A will cannot be formally proved
 in chancery unless all the witnesses are
 present if living (post)

The English st requires that the
 1 Burr 417-8 witnesses be 'credible' but this word
 3 Burr 433. appears to be unnecessary & is omitted
 in our statute. for if it means 'competent'
 it is surely unnecessary for a man is not a witness
 unless he is a competent witness. if it means
 'entitled' to credit it is wholly nugatory for if
 upon trial it appears that one of the witnesses
 was not entitled to credit yet upon the
 testimony of the other two the devise may
 be adjudged good. If the word credible
 has any meaning it means I think 'credible'
 at the time of examination.

"Credible,"

(23)

It has been decided that a devisee in the devise Devised,
is not such a witness as the statute requires, at Conynge 91
least it is not so as to the interest given to Barth 574
himself. & as to that the devise is void unless Edley 505
there are three witnesses besides him but as to 12, mod 172
the rest of the will he can be a witness? see below Pon 114-16

And doubtless a person legally infamous is H Jones 93
not competent to attest a devise. And if he Pon 16. 136
subscribes his name as a witness the will is precisely Hill
the same as tho' he ^{had} not subscribed the instrument, Jennings 100
91 he utters

But assuming that one of the witnesses is
a devisee & that for that reason he is incompetent
to testify to any part of the will, ^{with a release} will a
release given by him of all claim under the The release
will qualify him to testify in support of undoubtedly
the other parts of the will. This was one of qualify him
the greatest questions ever argued in to testify - but
Hall. - the true question
is whether the
attestation is
suff.

It was held by See
chf justice that the devise is not sufficient
that it was not at 1253
Pon 116. 119. Conynge & Cowling 120

The same doctrine was held in the Pon 120
case Hill & Jennings Conynge 91. (Ver 503) Ed Ray 505
But this opinion was also delivered obiter (Ver 503) Barth

But the question was decided in 1 Burn 411
favor of the devise in such case. & this appears Pon 124. 120.
is it to be the correct opinion. - It is an universal Burn 417. 8
rule that a release renders a witness once interested 1 Ver 503
a competent witness. - Their bias is removed when 2 Ver 374
they testify, 1 Day 41 note Pon 136.

In 1 Day 41 note may be found the opinion of Lord
Camden who held that a devisee or legatee can
not become competent to testify in support of a
devise under which they claim - legacy &c. & that even if
they release all claims under it that they are still unqualified

"Credible"Devisees.

Our superior court have decided that the rest of the will in such case would be good but this judgment was reversed in the senate which was then the supreme Ct of errors. this case is not reported (Wadsworth Hamp).

Baith 514

1811 11455

1 Bun 428.

Stra 125.

Pon 122.3.

Hbourn

Act 32 & 33.

However the question still remains whether with any release of his int^{ty} the devise to him is ab initio void & that the will is therefore as to the other parts well attested. In favour of this opinion there is the whole weight of the authority of parliament who by 25 Geo 2: c 6. 51 have enacted that a devise to a person who is a subscribing witness shall be void & that this devise shall be admitted as a witness like any other person to attest the other parts of the devise. & 6 Geo 2: c 11. s 2. If a creditor whose debts are charged ^{on} the real estate by the devise be witness to such devise he shall be a good witness. We have also a statute made in 1807 declaring that if any beneficial devise legacy or interest be given in any will to any person subscribing the will as a witness that the devise shall be void as to him & all claiming under him. unless the will shall be otherwise duly attested & such person shall be admitted as a witness in the same manner as if such devise legacy &c had not been given. Provided however that such person be not heir at law of the testator. also provided that this section does not operate as to wills prior to 1 Jan 1808

A legatee or devisee on the other hand whether Devisees
 he is a ~~subscribing~~ witness or not is always a Devisee
 a good witness in the devise Pon 435

Can Ex'r in a will having no beneficial interest Dury 134.
 is a competent witness where not a party - 100 of Gill v. Ellis Exp. 2419.
 2 East 183. ^{12 Co. 150.} And a legatee is always a competent witness 1 Bun 427
 where it is indiff't to him whether the will stands Pon 435
 or not. Ex If there are two wills in each of whh
 he has the same legacy. He is competent to testify
 in favour of that of whh he is subscribing witness.

Where there is a disposition of real & personal
 property in the same instrument if it is not Good 514
 executed according to the stat of frauds 2 Ves 720.
 tho void as to the real estate yet it ^{may be} good 319. 327. 332
 good as to the personal property. 337.

Pon 4118. -
 Stra 1255.

'Who may devise?'

The rule seems to be that all persons who
 are able to convey at common law real estate
 by deed & who are not disqualified by the
 exp'ress words of the statute. may devise.

The words of the statute are 'all persons.'
 may devise

But this includes only natural persons Pon 439
 & not bodies corporate. or aggregate or sole 1 Roll 608
 corporations - An aggregate corporation never
 dies

And as to natural persons there are four Dyer 354. 6
 exceptions & then are expressly excepted in the 1 Ves 300
 explanatory stat of 34 Hen 8th they are the following Pon 440. 2
 Infancy. idocy. non sane memory & coarcture
 but on the construction of 32 & 8, the rule w?
 have been the same on com. law principles.

Who may devise?

Godde 42 It has been held that a person deaf dumb
1 Bl 304 & blind can not devise. for such persons were
Pow 145 considered as wanting understanding—

At this day I presume that a person deaf
blind & dumb could devise if it could be shown
that such person has suff^t intelligence. tho' the
presumption must still be that they are disqual-
ified—

6 Co 23 It is not suff^t then that a testator can
Pow 146 remember common events he must have a
Dyer 72 disposing memory whh means understanding
Fitz 233 enough to make a rational disposition of
his estate.

By an idiot is meant who from his
birth never had any understanding. One who
in common parlance is called a natural fool

By a lunatic is meant one who has lost his
understanding by some supervenient cause—

What is a sane or disposing memory a mind
6 Co 23b is for the common law to decide but whether
Pow 146 such mind exist in a particular case is a
mere question of fact for the jury

With regard to coverture it is in genl supposed
Hob 225 that her acts are done by the coercion of the
Dyer 354 husband. but this is not the sole ground of
H Co 61 her disqualification. the rule is rather founded
Co Litt 112b on their legal union & the policy of the law
Pow 146
"Hus & wife"
Pow 147:8 And it has been held in Eng^l that
a local custom that a feme covert may devise
is void as being unreasonable.

Who may devise? Devises.

In this state it was decided in the case of Adams & Kellogg that a feme covert might devise real estate. But this was afterwards overruled. 2 Day 163 but now by st feme covert are enabled to devise real estate. but this is peculiar to this state. But here she cannot by her devise deprive the husband of his courtesy where he is entitled to it. for the act of devising is merely placing another person in the place of the heir at law. And in a similar case the Wife is therefore entitled to dower.

When a husband is banished for life 2 Vern 104 the wife remaining in the Kingdom may make Pow: 148:9 a valid devise.

And even in Engl: there are modes in which a feme covert may procure the same power over her estate as if she were sole. In such cases however her act is in the nature of a declaration of trust or appointment. she acts in legal theory in such case as an agent executing an authority. her act is in neither case in law a disposing act.

- 1. By way of trust see 'Hus & wife'
- 2. By way of power over a used

1st Thus if a woman while sole conveys her estate to trustees in trust for herself for her separate use during coverture & in trust after 2 Atk 695 wards for such persons as she shall by her will appoint. she may during coverture make 3 Atk 707 an appointment which give the estate to the appointees. The same thing may be done by Pow: 148:9 a settlement made during coverture by fine &c. 50

(28)

Who may devise?

Devises.

But it must be kept continually in mind that the conveyance to trustees is the disposing act & the naming the persons is merely executing a naked authority, whh a feme covert may always do if of full age. but the execution of this power must be according to the statute of frauds.

32th 897 & a feme covert while an infant cannot however
14th 298 execute such a power. for the execution of such
2nd 100 a power implies discretion. & an infant can
43-7 only execute a strict power. but a feme
32th 695 covert may exercise a power whh involves the
710:14:15 use of discretion -

Rayn 334 Restraint dissep. & menace of imprisonment
Pon 170. disqualify any one from making a valid devise
Dyer 143.6 And indeed any coercion - This is the com: law
rule. It is said by Mr. Pon^d that this rule
is implied from the words in the stat at his
free will & pleasure but witht such words
in the stat the devise would be void on com: law principles

Pon 107 And it has been held that when a sick
Stle 427 man was induced by excessive importunity
1 Ch 266 that he might obtain repore to make a
Com: & will that such will was void. But this
Dev. Cork 1 a vague rule. & if a will can ever be set
10th 118 aside for this cause it must be a very
clear & very strong one. This certainly w^d not
make a deed void. Nothing less than legal rebellion.

Holt 246 If either of these disabilities exists at
Pon 172:3 the inception of the devise viz at its
11, Mod 157 execution & publication. that the disability
Rayn 84 was removed before his death is no reason
Salh 238. for considering the devise good.

Who may devise?

(29.)

If then a feme covert devises her estate & after wards her husband dies & then she dies the will will not be good. For the consummation is founded on the inception, Com 684
Poult 172:3

A joint tenant cannot devise land held in jt tenancy the right of the survivor is paramount. Perk 550
Lett 5287
1 Eq: ca 172 Poult 174-6. Co Lett 185 [a]

This was the rule in Engl? where the custom of devising was in existence before the Stat Henry 8th & the Stat of wills excludes jt tenants.

44. There cannot be a jt devise made by two persons whether they own jointly or severally. no. Com 269.

o And if a jt tenant makes a devise of his part & survives his companion & then dies the devise being void ab initio can never become good for from the moment the jt tenant died he became seized in severalty. 1 Bl Co 476
3 Burr 1488
Co 31
Popham
1 Eq: ca 171
Perk 550.

o I do not know in this state that there is any objection to a joint devise on principle where those who make the joint devise are jt tenants. They can make a jt deed they cannot in Engl? make a joint devise on acct of the survivorship but this is no objection in this state where the vis accrescendi does not exist.

45. It is a genl principle that a man cannot devise real property whl he has not at the time of execution & publication of the devise. If therefore a testator devises to day "all his lands" & tomorrow purchases other land. the latter will not pass. So if the words had been "all the lands of which I shall be seized" Co Lett 111
Bos 401
Salk 237
Holt 246
744.50
Poult 183, 198.

(1846) Who may Devise?

Devisees.

In order to enable a person to devise he must either have a present interest or a present possibility coupled with an interest. & it is a good rule that one cannot give by devise what he could not dispose of by deed & even livery of seisin is dispensed with only from necessity.

1 P. 115 75 But this rule does not hold as to chattel int as lease for years it holds only as to real property. If then a man sh^d devise thus I give all my lease for years of what I shall die possessed this will carry a lease purchased after the will. for a man is continually changing his personal property & lease for years follow the rule concerning personal property.

Holt 748 It is also necessary to a devise of real prop property that the devise sh^d be seized & 1 Roll 616 it. the reason is that the devise is consummated at the testator's death. If then 266. 611. 183 the owner of land devises it & is then dispossessed & continues so until his death the devise is void. for at the time of his death his right to the land is a chose in action. vide D. 9. 11. 156.

1 E. ca 174 But it seems that when a man is dispossessed by fraud or purpose to defeat the devise the devise will in equity will be enforced under the jurisdiction of that C. to relieve against fraud.

If therefore the heir disposes the ancestor just before the death of the ancestor for the purpose of defeating the Devise the Devise will be adjudged good the dispositor notwithstanding.

Who may devise? (1. 40)

But if the owner is seized after devising Devises.
and enters & dies seized the devise is good Salk 238
for by the law of relation the owner is Holt 748
deemed to have been seized during the whole Pulman 205
time & it is upon this same principle that 11 Co 51. 44 B
a person ousted may recover for the same Pon 185. 6.
profits from the disseisor during the disseisor's
life. There is indeed in this case no necessity
for applying this doctrine, for the case is
not within the rule that he must be seized at the making
& death. If the owner is disseized at the time of Salk 238
making the devise but afterwards enters & 2 Bac 52.
dies seized the devise is good. The devise is? It devise. B.
he said yes it not for the fiction of Pon 185. 6.
relation for he is supposed to have disseized
been seized (or his reentry) at the time of the
devise

7. If one makes a devise of land specifically Holt 251. 3
all he does not at the time own but afterwards 9243.
purchases the same land the devise as to that Blond 344
land is not good. for however clear the intention Pon 200. 2
may be it cannot be carried into effect in Ed. 438
consistency with the rules of law. for it is a Salk 337
common law principle that a person cannot 3 Barn 148
devise what he has no interest in at the time 750. 206
either in fact or by fiction of law. the 414 (argu^o)
principle in chattels is this that at common
law real property cannot be transferred without
livery of seizen. but in devises livery of seizen
is dispensed with but still it dispenses with no
more than this and the rule is that a person
cannot devise property, while at the time of the
devise he could not have disposed of by deed
& livery of seizen.

(147) Who may devise

Pon 202
B Ch 49. On the same principle if a mortgagee devises
the estate mortgaged to him in fee simple &
afterwards purchases the equity of redemption the
equity of redemption does not pass.

3 Day 166 It seems however that in this state a
person may devise land of which he is not
seized at the time of the testator's death
for our Ct have determined that a person
disseized of real estate may transmit his real
estate to his heir notwithstanding the disseizure
& as a devise is here factive the same rule
is probably govern in a devise as governs in
the transmission of estate by inheritance.

The rule perhaps is founded on the
construction of our St. "The English stat is
all persons having fe - By the Stat of Connt.
"the owner of lands may devise" - Besides in
Ct a right of possession is equivalent to
actual possession in England.

Real Property (A 21)

Devises. Who may devise?

8) A person having an equitable interest in lands is a claim to them only in equity, may still devise the lands themselves. Thus if B. makes a contract to purchase lands & then make his devise of all his lands or of those particular lands. the devise in equity passes the lands for in equity from the time of this contract the title of the land is in B. for that court considers as done what ought to be done. The principle in short is this that the vendor is considered as trustee for B. Nor is B. dispossessed by the vendor's remaining in possession for seisin is not predicable of a man with an equitable interest & besides the possession of the vendor is not inconsistent with the right of B. —

But in such a case the land is not passed under a devise made before the executory agreement was made. for before, B. had not even an equitable interest in the land

It is indeed said that if the devise were for the payment of debts the rule is different but I think that there is neither principle or authority for this dictum —

49) Things devisable. In the English statute the words are 'all lands'. The term lands denotes not the interest of the tenant but the subject matter. for all interests are not devisable. but all lands are devisable by him who has a devisable interest in them. But tenements & hereditaments not valuable as rights of way & franchises are not devisable as rights of way are regarded as easements & not interests in land — franchises are personal

(40) Things devisable in what interest in them is necessary to
render them devisable?
Devises etc. are easements devisable under our statute
for they are not "real estate".

But rents are devisable if the owner has a
devisable interest, as a fee simple rent, for this
is a valuable interest. It seems tho' it is an
incorporeal hereditament.

50/ Little 144 In an annuity in fee simple is also devisable
Pon 229 this differs from a rent in that rent is charged
on land an annuity is charged on the person
of the grantor.

What estates are devisable?

201 218:29 Under the English st no other than
2 Bl 374 a fee simple estate is devisable. It is so
expressed in 34 Hen 8th Chattel interests were
devisable at common law & are therefore still
devisable.

The words of our st appear to include
estates per autre vie: "see ante"

And the st Geo 2^d makes them devis-
able in Engl^d.

51/ 3 Bulb 104 The term fee simple in the English st
Pon 232:5 is used in the most comprehensive sense.
One may under that devise a fee simple
remainder or reversion. base fee &c.

116/1833. A devisable fee simple not in reversion
Croia 231 may be then either a fee simple in reversion
217. 293 a vested remainder in fee simple or a contingent
405. remainder, in fee or an executory devise in fee
Pon 600. simple & each of these may be devised

What estates may be created by devise?

(52)

So also estates subject to a condition of entry Devisees may be devised. Thus A conveys to B an estate in fee simple on condition that unless B or his heirs ^{he may enter} shall pay £1000 to A or his heirs within 20 yrs, B may devise his interest. But A may not devise his interest. 'see ante'

And as estates may be transferred by devise. So new estates may be created by devise. Thus if a tenant in fee devises to B an estate for life for 60 years or in tail & indeed any estate which may be created by deed & one particular estate which cannot be created by deed viz an executory devise

4) So a tenant in fee simple after having created by devise a less estate than his own may create a number of other estates out of his reversion ad infinitum

5) Again estates created by devise may be absolute or conditional.

6) An estate merely equitable may be created by devise. that is an owner of an estate may devise land to one for the use of another or to one in trust for another.

(57)

What may be devised? Authorities,Devises

Pon 27/1/83

Land may be devised to one person to the use of another but since the st. of uses the use is executed & therefore the legal estate vests in the cestuique use. so there appears to be no advantage in limiting an estate to one for the use of another.

2 Bl 325. c

Pon 285

But an estate devised in trust is a very different thing. An equitable estate may then now be devised to one thro' the medium of a trust as a devise to A & his heirs in trust for B & his heirs & then to A & his heirs to pay over the profits to B & his heirs & these two forms produce precisely the same effect. for in the last case the equitable trust is in B & his heirs. & will as in the first case.

57/

Bro 5 678

734. 341.

Pon 29. 240

292.

46/73.

Co Litt 113.

1 Roll 330.

Pon 293. 24.

Further a person may devise not only a devisable interest but a bare authority over an interest thus one devises that J. shall have the disposing ordering letting &c. of his estate. J. has this authority but has no interest in the land & has no authority to sell for the word disposing means 'managing' not disposing of he can make any leases but not will

If one devises that his executors shall sell his land or order in his will that his lands shall be sold by them. they have authority to sell but in the case above J. has not the power of selling but merely of regulating

Authority created by devise are of two kinds (Services,
1st Base authorities. And authorities coupled Comp 263
with an interest. For 292

II. A Base a naked authority is a mere power. And is connected with no manner of interest. It is a mere power of Attorney. Not like other powers of Attorney which are revoked by the death of the person who gives the power — 60 Att 113.
For 292. 302
Comp 426.
3 East 553

1) And when one devises that his executor shall sell his lands the feehold descends on his death immediately to the heir liable to be directed when the executor shall sell. If the land is devised to A & the power to B the estate descends to the devise, subject to the power. 60 Att 113
3 East 553
For 292. 3

And a release of such an authority by the person empowered is utterly void. as in the case above if the executor sh^d release his authority to the heir. It is utterly void for such an authority is personal & cannot be transferred & therefore not released & after such a release the executor may still sell. & on application a Ct of Chancery will compel him to sell. 60 Att 446
For 293. 4

2) And it is an universal rule that such a power must be strictly performed & therefore the execution of the power must always be construed with reference to the power itself. Thus if a devise gives a power to lease land for 20 years if A makes a lease for 21 yrs this lease is utterly void. 2 JR 241
For 294
1 Burr 120
2 East 376
Comp 267
2 Ves 644
1 Wils 176

This power is strictly personal it cannot therefore be transferred unless there is authority to transfer & then the transfer is a part of the power — It cannot be devised.

Devise

fend 44

Pon 294.5

Dyer 177

1 Root 67

"M & R"

And if a power of this kind is given to two one of whom dies before its execution it never can be executed by the other in case of necessity indeed a Ct of equity may appoint another. And on the same principle he cannot devise it. i.e. such a power is not devisable. — If the devise were that either of them might sell. or that the survivor might sell the rule would be otherwise.

bro 26.52

bolett 113.

Pon 296.7

Dyer 176.6

219a.

But if a person devising thus I empower my executors to sell my land & there happens to be three if one dies the other two may devise. But if there be in such case but two executors the survivor may not sell for the authority is to executors not to an executor. — The words of the power are in one case satisfied & in the other not.

(63)

Pon 291.9

3.77

2 Elem 320

Dyer 371.6

Fuller m 64

114.

Falk 127.

1 Cor 30.304

If a testator devises that his land shall be sold with naming the persons who shall sell if the proceeds of the sale are to be distributed by the executors they are the persons to sell. And in this case if there be two executors one of whom dies the other may sell for they take the power not as trustees but as executors & virtute officii but if the executors were named in the devise the rule at supra is defto.

1 Atk 420

Pon 299

ver 304

Pon 307.

But if it is devised that lands shall be sold & the proceeds of the sale are to go into the hands of others than the executors the heir is the person to sell.

Powers coupled with an interest

(63)

If the person thus empowered to sell land refuses to execute the power then who are to receive the proceeds of the sale may compel in chancery the person having the power to sell to make a sale according to the power, & if he dies before a sale the Ct of Chancery will supply a trustee. If thinks this the regular course in the case above where the exr refuses, ^{viz} to appoint another trustee there is something harsh in compelling a man to accept a power of Att, &c. —

If one devises his estate to J. to be sold this is the devise of an authority coupled with an interest. It is an immediate devise of the land itself. —

do if one devises the profits of his land to (for the purpose of educating his son) till he shall attain the age of 21. This is a devise of an authority with an interest. for the devise of the profits of land is a devise of the land itself —

In case of an authority coupled with an interest the interest is the principal & the authority the accessory.

In the case of an authority coupled with an interest the devise & his representative will hold the land till the expiration of the time mentioned in the devise but in the case of a bare authority it ceases with the death of the devisee.

Authority coupled with an interest.

An Example is Entickenden v. Carey, the husband & wife made a disposition of the realty to A. by way in fee & land with the principle last advanced & therefore explain a little the principle of the rule. Suppose A. gives land to B. for the purpose of educating the son of A. until the son attains the age of 21. Now if B. dies it is clear to § 2. that B.'s representatives take the estate & must apply the profits to the education of the son. This devise is tantamount to a devise of land to B. subject to a charge viz the expense of educating the son. The devisee has an estate own owned.

P. 202

Dy. 210.

And if in this case the son had died before attaining the age of 21. still the devise holds the land until by computation the son would have attained to the age of 21. - The authority is accessory & the interest the principal. If the power had been a naked authority when the object failed the auth^y w^d fail with it.

Comp 266

An appointment by will is no execution of a power to appoint to appoint by ^{dead} will & converso for powers must be pursued strictly both as to the mode as well as in other respects.

1 Bl 477

P. 314

H. 6. 136.

1 Bl 265.

Who may take by devise?

All persons not incapacitated by positive law may be devisees. But by 34 & 35 H. 8. c. 1. Devises in mortmain are void but by 43rd Eliz some exceptions are made. But by 29 Geo 3rd this exception is narrowed so that devises to corporations are in gen^l void this was made on acc^t of the influence of the clergy in obtaining land by devise.

Who may take by devise?

(60)

In this state corporations are not prohibited Devise from taking land by devise by any genl law & therefore in genl corporations whh may purchase or hold real property may take land by devise. unless prohibited by their charter.

7/ Persons taking by devise may be either civil Pon 315 or natural persons. Natural persons capable of taking by devise may be either in esse or not in esse at the time of the testator's death. Those in esse may of course be devisees unless incapacitated by some civil inability.

Coverture is no disability to take by devise. Pon 5343.4 The husd may however at law defeat Pon 315 a devise to a wife by his devise for a devise Pon 43.4. always supposes a mutual devise & the devise of the hus. is the devise of the wife but a Ct of eq. will interfere to prevent the hus. from any devise whh will injure the wife where the devise is unreasonable.

And a woman may be devise to her husband, at law as well as in equity tho' 1 Eq. ca. 173 in law she cannot be granted to her husband 60 Litt 1220. The legal union of hus & wife is the reason why the wife Pon 315.6. cannot be granted. But in case of a devise ^{when the devise is of the whole} the union is destroyed. Coll 510 An alien friend can take a devise but he 2 Ves 360 can hold only till 'office found' (as in the Pon 316-18 case of deeds). When this inquest finds him an alien the title ceases & vests in the crown a statute 4 Leon 384 The estate passes therefore from the heir at law "Heir 14" by the devise.

Who may be devised?

Devises

An illegitimate child cannot take by devise until he has acquired a name by reputation but having acquired a name by reputation he may take a devise then to the son of A. A's son being illegitimate he can not take unless at the testator's death he has acquired the reputation of being the son of A. & this reputation can be acquired only by lapse of time.

But if a devise is made to the children of A he having both legitimate & illegitimate children the whole estate goes to the former. And it seems that the rule is the same when the devise is made by the mother, for it is to be presumed that it is the intention of the testator when he merely says children to give the property to the legitimate children only.

But natural persons, not in esse may be devised thus a posthumous child may take as well as one born before the testator's death. A distinction was formerly taken between a devise in the present tense to an unborn child & a devise to an unborn child in the future, & between a present devise to them & a devise to them by way of remainder.

00/

But on 10th 11 1743. If an estate is limited over for life remainder to his unborn child a posthumous child ^{a during the life time of the father} may take ^{if} born in the testator's life time, or if the particular estate sh^d fail before the remainder man is born the remainder is still good tho' at com. law this was not so. the words of the st do not extend to devising the words being by any marriage or other settlement but in construction it is extended to devising.

Devisees

A distinction has been taken between an unborn child not in praesentia matris by present 1 Ky. ca 170 words & in future words. If the words were future 1 Sid 753 thus a devise to an infant when it should be born 5 J. 250:1 was held good by way of exogy devise -

Frame 419

And in this case also it was held 1 Ler 135. that if the words were future the child is Jack 229 take if the words were present the child is Stra 1093. could not take.

A devise to such child as it shall have 5 J. 250:1 living at his death will vest as well in Rein 6150. a posthumous child as was as in one born 2 PM 4246. at the testator's death. for here the devise 2 H. 279 is executory, & he is for this purpose deemed living 1 B. 4243.

But in 10 J. 109 the question whether 1 B. 230 a devise to an unborn child by present 2 B. 273:6 words were good was unsettled. Tho it was Raym 53 agreed that if the word were prospective in a 1 Ler 135:6 son born after the testator's death is take 1 B. 322, 332.

The ground of this distinction must have been 1 Freeman 244 the intention of the testator. it could not have 2 Prod 5:9 been the feudal doctrine of abeyance (see next page) 1 Mil. 155

Where the devise is per verba de presenti Frame 428 - the devise in terms is not executory & this is urged as an objection to the devisees taking Long 476 for if he takes at all he must take by way of exogy devise - & this is said to be contrary to 1 B. 2157 of testator's intention as manifested by using verba de presenti 1 Mil. 225. But I think that the weight of authority in Frame 418 - favours of the devise in both of these cases. & for answer to this objection vide post

(71) Who may take by devise

Devisees.

Pin 324

3 Bac 124

2 Wode 233

Don 326.

1 PPM 505

Long 481

5 J.R. 57

3 Wils 526

Co Litt 116

Note 4.

The objection stated to an infants taking who was unborn at the time of the testators death by present words is that the feoffor would be in abeyance but this reason is unsatisfactory for until the child is born the feoffor descends to the heir at law of the testator until the child is born and in such a case the heir at law holding till the child is born is not accountable to this devise for the profits of the estate devised to the unborn child. for in truth the devise does not take until he is born until that event the heir at law owns the estate. & besides this objection applies if true with equal force to every exory devise.

der B5

1 Eq. ca 173

2 Kel 300

1 Kel 172

Talb 145

folk 224.30

At any rate when the devise is in the present tense to a person to be born in future & there are words in the devise which show that the testator knew that the devisee was unborn at the time. the unborn child will take as well as if the words were in the future tense. Or the rule is the same if the devise adverts to facts which afford an inference that the testator knew that the child was unborn at the time. of the devise thus. If a son shall be born to J.S. I devise to him or her my estate. the child will take. tho born after the testators death for the testator takes notice that the child is not born & this makes the devise executory.

Who may be devisees?

71

I take the rule now to be that every Devisee devise to an unborn child ^{described in the devise} as such does afford the inference mentioned in the last rule & therefore tho' the ^{devise} is in the present tense the unborn child when born will take, for the intent is clear that the limitation shall take effect on the future birth of each child so that the disposition is intended as executory. 4 Bun 271, Salp 230, 1 PM 456, Fearn 428, 1 Milson 105, 2 Mod 819, Bou 336-7, 336.

When the devise is described as unborn the disposition is necessarily intended as executory if the child is unborn at the time of the testator's death.

So also civil persons may be devisees that persons may take under a description of civil capacity. As a devise to the executor of A. And a devise to the executor of the executor of B. is good, if the intention is clear indeed it is a good rule that civil persons not in esse may be devisees as in the above example the executor of the executor of B.

The members of a town are not such civil persons as can take under that character. If then one devises to the parsonage of the parish of A is void, tho' a devise to the parson of A may be good. A devise to the inhabitants of the town of A is void a devise to the town of A may be good. For no one w^d suppose that a devise w^d intend that all the inhabitants sh^d take as tenants in common or joint tenants. but as they are not described in the devise as a corporation they cannot take as corporations. 1 Roll 614, Poul 336, 609.

Devisee

2 Conn. R 287.

And a devise to a ^{meaning the body of communicants} church, is void this was decided within a few years in Conn. that case the devise was to the church of the Baptist church of Greenwich for the church could not take as a corporation under this description, for the church was not a corporation. but it was not the intention of the testator to give the estate to the individuals of the church. they therefore c^d not take at all — So a devise "to the yearly meeting of people called quakers" was held to be void. (Conn. 1826)

[74] 1786/7

1 Conn. 493. 340

407. 405. 337

1 Coll. 37

"Dec 25"
"Feb 17. 110"

Every devisee must be properly designated or he can not take, but this designation may be either by naming him or by describing him or by both & tho' his name is mistaken yet if he is described so that the description will apply to no other he may take. But this will receive some qualification (in part man the namption of parole evidence to explain devise)

For example a devise to the governor treasurer or executor of such a state is good. A devise to the son of I. D. is good if I. D. has but one son —

Attk 410

Par. 330.

750 731/4

post 88

And the description tho' not perfectly applicable may be made good by reputation as in the case of an illegitimate child. So a devise to the wife of A will give an estate to the reputed wife of A tho' not his legal wife

But this rule never holds in favor of an Devise,
illegitimate child born after the devise made. For 509:10
 for if he takes at all he must take by 6 Co 65
 being reputed the son of Jd. at the time of the 6 Co Litt 1236
 devise made whh reputation he could 1 P M 324
 not acquire until born. Pm 338:9

And besides Pm says the law will not expect
 that such should be born, nor will it give liberty
 to provide for such before they are in op^{se}. Which
 is a more satisfactory reason in case the child is
 described 'is the first illegitimate child of AB
 (a woman) in whh case the description is certain.
 Hence also a devise to all the natural 6 Co Litt 530
 children of A will not inure to the Pm 339
 child in ventre matris at the time of
 making the devise. for this child could
 not have gained by reputation the name
 of being the child of A & besides the
 possibility is too remote that one will
 have a natural child in future and the
 policy of the law operates here as strongly
 as in the case above.

A woman may take by devise under the Pm 340
 description of being the wife of Jd. if she is 6 Co 73:2
 reputed to be his wife tho she is not his lawful
 wife. for all that is necessary is to ascertain the
 intention of the testator -

(74) Devisee how described?

Devisee So a devise may be constituted by an
Pa 340:96 innuente a equivocal designation ex gra.
496. under a devise to seniori pueri of the devisee
Don 337 a daughter may take if such appears to have
Mod 104:5 been the intent. the innuente facit the words
40632. denote a son, & a son w? take under this
description to the exclusion of an elder daughter

So a daughter may take under the description
Pa 342 proximo sanguinis of the devisee. the the adjective
Cultivation is masculine as if to a son for the adjective
Prima 363 as applied to a female is only a verbal
Ly. ca 23:4 inaccuracy. so the elder daughter in the last
236 3102 can exclude the younger.
Not III'

75 Pa 344 The word child or children is a soft description
Lk. 17 ex gra "to a for life & afterwards to his children"
Mod 220. his children take a life estate in remainder
descriptio personarum. the word child being
descriptio personarum. (see deeds) (also estates)

Real Property (-1822)

Devise.

The word children is generally used as a word of description in which case the persons so described take *Int 744* as purchasers. *Ex gra last case*. So if an estate is devised to A & his children (he then having children) he & they *Ex gra 744* take a joint estate as purchasers.

*Note or which is the same thing a word of purchase as contradistinguished from words of limitation or inheritance.

Parole evidence is admitted to show whether there were or were not children at the time the devise was made (*post*).

But if A in the last case has no children at *Ex gra 176* the time of making the devise children is a *Long 307-10* word of limitation denoting the quantity of that *Post 508* devised. i.e. the children take a special heir. *1 H.B.C. 456.60* this cannot take in remainder as purchasers for *1 Bul 219* they are not in *Ex gra* & therefore takes an estate tail *1 Kent 207* & they of course as if in tail per formance *H.J. 291.4* done. *Estates.*

- 6) And note as a general rule that the testator's intention is to be collected from the state of things (*post*) existing at the time of making the devise. *Ex gra*. For A's wife means her who was his wife at the time of making & publishing the devise & not a subsequent wife who might have been his wife at the time of his death. This rule does not apply where the devise is to the heir or heirs male of a person living at the time of the devise &c.

Devise

Pon. 345.6.

The description of a devise may be either gen'l or special. By a gen'l description is meant any ~~one~~ designation of any person who may happen to answer the description & not of any one individual identified at the time of devising.

16.
4-633
by 333.6

1st Gen'l as if one devises to fel. in tail, remainder to the next heir male of the devisor in this case he who happens to be next heir male is constituted the devise in remainder. same rule if to fel. supra remainder to the next heir of the devisor.

H-633

By 333.6.

Pon. 345.6.

So a devise may be constituted by a devise to such a stock "family" or house & it will inure to the heir principal of "the house family".

259. ca 290.

Pon. 347

If a devise is made to "the posterity of A" his lineal heir if he has any shall take & if he has not A's collaternal heir of the whole blood will take

605 532.

406 32.

Pon. 347

If a devise is made to "the next of the name of the testator" the next relation of his name whether male or female will take. i.e.

So a devise may be described by the words Devisee
"next of kin to the testator in which was the person" Bro 576
answering that description by the rules for computing 3 East 274
the degrees of kindred will take. in this case those 3 Bro 647 70 234
& those only will take who answer the description 4 Do 207
under the st of distributions. And the legal compu-
tation of those degrees always relates to the time of
the testator's death. Such being the rule under the st
of distributions 29. bar 2^d

And if a particular estate to another is inter-
posed still the words next of kin are construed to
include those and those only who answer the
description at the time of the testator's death. then
words are construed as they are in the st.

So the words "nearest of relation of my name" is 1 Vesey 335
a good description but in this case the word In 247 407
relation is nomen collectivum & includes all
the testator's nearest relations in the degree mentioned
Ex gra. all his brother & sister of the same name
if he has no nearer relations (his sisters if married
& of diff^t names w^d be excluded in this case)

Devises

On E 532:76

Pon 532:3

Ed H's

1 Nov 338.

Devise how described? Genl Description

Where one devises lands to 'the next of his name'
 It has been a question how far a daughter who
 who by marriage has changed her name can
 take? According to some this is the distinction
 If she is unmarried at the time of the devise
 and also at the testator's death she may take
 tho married at the time when the question
 arises. Devise if married at the time of the
 devise & at the testator's death

But B. H. Andrus seems to think that if the
 devise is immediate & by way of vested remainder
 it is sufft if she is unmarried at the time when
 the devise was made. If limited on a contingency
 that her name at the time the contingency
 happens decides her right this opinion seems
reasonable & conformable to the genl rules.

If the testator explains who he means by nearest
 of kin or nearest relations persons not falling
 under the description "nearest &c" may take Ex gra
 to my nearest relations the Stiles & Crokes have
 the latter tho they be not so near as the former
 shall take with them.

* If one devises to his 'nearest relations' his wife as Devisee.
such takes no part. for tho' she w^d be entitled to ^{Widow's st}
a part under the st yet she is not a wife her ^{30th 759:61}
relation is not related by consanguinity not of ^{Pen: 350:1}
kin. the words therefore exclude the wife

If one bequeaths personal property thus (to my nearest relations' then relations who w^d take as such
under the st of Limitations distributions are the
legates so it seems if the words were "my relations"

So if the words were 'my nearest relations'
according to the st of Distributions - & then words
w^d exclude the wife -

But parole evidence may limit the words (post)
But if devises of lands are thus described & whether
the above rule w^d hold or whether the devise w^d
not be void by reason of its uncertainty?

In Conn^t & in the other states the st w^d ascertain
the devisees in the last case as well as in the first
for the Conn^t st regulates the succession as well to
the real as to the personal estate of the testator

Rule in Shelley's case,Devises

Pon 558.55

2 Bl 242

2 Pon 6.41

1 Co 99

1 Ld Ray 377

2 Mil 523

1 Ann 38

4 Cr 50.246

5 Cr 297.388

6 Cr 70

7 Cr 503

3 Dev 437

1 Barr 38

Long 323.

5 Cr 10.

It is a good rule of construction founded on feudal principles that if an estate of freehold is devised to one with an immediate or intermediate remainder to "his heirs" or heirs of his body "or his issue" he takes an inheritance in the first case a fee simple & in the two latter an inheritance in fee tail. If then tano is devised to a for life remainder to the heirs of A. A takes a fee simple. If an estate is limited to a for life remainder to B for life remainder to the heirs of the body of A. A takes an estate tail liable to be interrupted by the intermediate life estate of B.

The reason of this rule is that the words heirs are considered as words of limitation & not of description.

In this state this rule is abrogated by express statute.

Bro 240

6 Co 17.6

2 Ld 224

4 Barr 2079

1 Ex 184

"Powers of Ch"

In Engl^d however this rule is qualified by state decisions, for it must be confessed that it is the intention of the testator to give A only a life estate & to use the words heirs as words of description & when from the face of the devise it appears that this was the intention of the testator it will be carried into effect.

Thus an estate to a for life remainder to Devises, his heir for life here the word heir is plainly Pou 358.4 used as a word of description & it takes an estate for life

So where there is a devise to a for life um? bro 40 to his eldest issue male it takes only an estate Co 17.6 for life. Pou 359

So where the devise is to a for life remainder to his & to his heirs forever, here since um? fact 224 of limitation is added to the word issue it is Pou 359 clear that the word issue is used as a word of purchase, & therefore it takes only a life estate.

And indeed the word issue in its proper Str 701 sense is a word of description tho' it is in genl bro 40 in devises construed as a word of limitation by HJR 294 reason of the supposed intention of the testator Pou 360 but still where the intention is clear to use it as a word of description it will be so construed.

So "to A for life remainder to his eldest bro 40 issue male" it takes an estate for life tho' this Co 17.6 is a case of some doubt. Had the words been 1 Atk 411 'eldest heir male' it w^d have taken a fee, Pou 359 Co E 313.

2) Special description

By wh^{ch} is meant the description of some one person in particular & not as in 1 Eq. ca 2114 the for^{mer} cases a description of any person who 1 Vent 334 may happen to answer the description. 2 Do 311

Thus a devise to the eldest son of J. S. who Raya 330 jd shall die is a genl description, but a 3 Kel 32. devise to the eldest son, or the heir male 2 Vern 660 of the body of a now living, is a special Con 365. description meaning him who is now heir apparent of a.

(13)

Special description of devisee,Devisee,

Died 193

Don 367.8

Jenk 213

It is laid down as a gent rule that the devisee must answer in all respects the description given of him. but this is by no means universal. If a devise is made to "the heir of B" & B is attainted of felony. B can have no heir & therefore no one can take under the devise but if the devise was to the heir of B, in this case it w^d take.

(134)

2 Leon 70

1 Co 66

Eg 94a

Don 369

If a devise is made to "the heir of B" & the testator dies in life of B the heir at law of B cannot take. for the description is gent and means him who shall be the heir of B at the death of the testator & the will must take effect on the death of the testator or not at all, but on the death of the testator it cannot be ascertained who will be the heir of B. There is no such person existing as answers the description,

Hob 34

1 Vent 372

Ed Ray 285

Rec int 468

447 464.5

Don 370

Where one is devised as a particular heir if it appears that a person not gent was intended to take under the devise such a person may take ex gra. where a man devised thus to my heir who is my brother a B. here A & B took tho he was not heir to the testator. It is apparent then that if a special description is added to the and heir the person specially described will take tho not heir

And where the intention is clear from the Revised will one may take under the description of 232121010. heir in the life time of the ancestor. Thus 10111229 the heir male of the body of A & by the same 10111229 instrument gives to A a legacy the persons 10111229 answering the description of heirs of the body of A will take. for here it is clear that the A is living at the time of the testator's death yet that the testator intended heir apparent since he has given a legacy to the father of the heir. by which he shows that he knew the father to be living.

For the intention of the testator shall be 3074. govern provided that intention is not repugnant 3074. to the principles of law & this rule is peremptory ante 4. to all others. But the intention of the testator cannot create limitations & estates which the law does not admit.

61 And a person in no sense answering the description of heir may take under words 40675.34 imparting to constitute him an heir as 40675.34 where one devises thus I will that my wife 40675.34 shall be my sole heir. the wife took the 40675.34 whole estate. so I will that I shall be 40675.34 sole heir to all my property. I. takes the whole estate. I am not to be taken for a

Special description of DeviseDevise

1 Ves 335

10 Co 576.

40 b 32

bro & 106.

Plowd 344a

523.

Poult 348:9

403:19

60 Letha

1 Freeman 293

Poult 405:7

It is after all a genl rule that if the description is so far certain that the person intended to take as devise can be ascertained that the devise shall not be void for uncertainty, or trifling inaccuracy. Or in other words, A devise is never to be construed void ~~from~~ uncertainty unless from necessity.

And therefore a devise to Margaret the eldest daughter of Jd. tho' Jd's eldest daughter is Margary. Margary the eldest daughter will take. — But if Jd had had a younger daughter named Margaret Dura (see post)

10 mod 371

Plowd 344

Poult 405:6

Ante 76

And if one devises to the wife of Jd. & Jd dies & the wife marries another person H. & then the testator dies, H. & H will take under the description of wife of Jd. for the rule is anted that a devise is to be construed with reference to the state of things at the time of making the will.

Pec in bk

175

Poult 406.

And when a man in his last illness devised to a posthumous child who was then expected & in fact the child was born before his death, yet it was held that the child was a posthumous child within the meaning of the will.

How a devise may fail of taking effect? (87)

If on the other hand the description given (Devisees) to a devise is not only inaccurate but false (Devisees) the devise cannot take. Thus if one devises Pro 409 here to the heir of J. D. & J. S. is an alien the devise will be void. for as no alien can have an heir this is not an imperfect description but a false one. But if he who claims under the devise be proved to be the reputed heir, Devisees Pro 409.

✓ How a devise may fail of taking effect.
1st from inherent defects. 2^d from some extrinsic Pro 409 cause, or from matters dehors the will.

✓ If then there is an uncertainty a repugnancy which cannot be cleared up in the words used as to thing devised, or the quality of inst. intended, &c. The devise must be void. These are called patent ambiguity. Under the same head fall limitations contrary to the law, or policy of the law, as if one limits an estate in perpetuity, &c.

✓ Extrinsic causes are those which arise from facts not appearing on the face of instrument Pro 409. 10 here the uncertainty is called a latent ambiguity, as where the doubt is to whom of several persons a will of several things is intended by the description—

✓ As to patent defects if there is on the face of Devisees Pro 411 a devise an uncertainty which cannot be explained or a repugnancy which cannot be reconciled the devise is void at least as to that part & such an uncertainty a repugnancy may exist in diff^t particulars, as with respect to the subject matter, the inst, the person of the devisee &c.

Devises.

1 B & P 353

2 Co 32.

Bro & 16. 113.

704.

1 P M 800. 27 & 498.

Ambiguity.

Thus if one devise a house with the appurtenances the construction will be that only the house with that which is absolutely necessary to the enjoyment of it shall pass for the word appurtenances is too uncertain to pass any more than that.

And where the ambiguity thus arises on the face of instrument the general rule is that it cannot be aided or explained by parol evidence for the law requires that a devise sh^d be written & if parol evidence sh^d be admitted this statute w^d be evaded. Besides it is a gen^l rule of the common law that latent ambiguities in an instrument shall never be explained by parol evidence.

3 East 172

Don 418

If the person described by the devise is on the face of the instrument so uncertain that the devise cannot be ascertained with certainty ^{or prob} the devise.

2 Vern 674. 5

Ray 82

1 Roll 609

Bro 260.

1 Buls 61.

1 Ves 335

10 Co 57. b

4 Co 32. Bro & 106. 2 La Ray 1312.

5 Co 68. b

Don 414.

1 Hyl 240.

(part)

6 R 671

2 Atk 374. 5

Thus to one of the sons of A. he having several sons. Thus also, twenty of the poorest of my relations, for these persons are unknown & therefore no certain intention can be collected from the words of the devise as to the devisees.

But a devise is never to be construed void from uncertainty unless from necessity.

As to latent ambiguities if from extrinsic facts the person of the devise is rendered absolutely uncertain the devise is void. Thus all my real estate to my son, when he has several sons it is prima facie void. Thus also a devise to A & B. when there are two persons of that name the devise is prima facie void. The meaning of this rule is that the devise must be void if there is no proof aliunde to prove which son or all A & B is intended.

Thus parole evidence is admitted to show latent (Devises.)
ambiguities. for here the uncertainty is created
by parole evidence & therefore may be explained
by parole. There is no ambiguity on the face of
the instrument.

So also if from extrinsic circumstances it is un-
certain what subject matter is intended, as here
the uncertainty is from parole evidence it may
be explained. Thus a devise to J. of my manor of L
when I have two manors of L. parole evidence is admitted

72) It is said however that if the devise is Prerogative
thus I give to A. one of my manors of L. where Bacon's Rep. 100
the testator has two manors of L. the devise may
elect wh. of the two manors he will take.

But where the devise is in alternation as to
one of the sons of J. here the will is void for uncer-
tainly unless parole evidence is adduced &c. for here
there can be no election. for who shall elect?

And devise may fail because the testator's 35 R 145.6.
intention is contrary to the rule of law. however Pier 471.26
clear the intention may be, as when the Salk 234.
testator limits a remainder on a contingency Bulb. 63.
too remote

Or when he limits an executive on a contingency
too remote in point of time. Thus to A. in
fee & if he dies with heirs to B.

In then cases the ambiguity is latent.
for the construction of the words is sheer matter of
law. and if the construction makes the limitation
contrary to law. this arises entirely from the face
of the instrument.

(92) How a Devise may fail of taking effect?

Devisees If in the draft of the instrument the
Morr 356. testator's instructions are not followed
Pur 426-7 & this is a fact whh can be proved by
parole the devise will be void. for the Devise
is not his act in law. This supposes that the
testator did not ~~not~~ know that his instructions
were departed from. But the last rule is to be taken with
1 Leon 113. this qualification viz if that part of the
Pur 427 instrument whh was contrary to the intention
of the testator can be separated from the
part whh is agreeable to it. the former is
void & the latter is good. Thus where a
testator directs an absolute ~~devise~~ ^{gift} in fee to his wife
and the scrivener of his own motion insert a condition
this condition (if unknown to the testator) will be
void & the devise absolute.

4624 Again a devise may fail of taking effect
2 Atk 57 because if operative it w^d effect no more
Pur 427-8 than the law w^d effect without it. Thus
2 Burr 850. if one devises to his heir at law the same
26. 57 estate whh he w^d have taken without such
Camp 420. devise the heir takes not as devise but as
1222 137 heir by descent. by estate here is not meant
10 Mm 397 land but "quantity of interest."

2 Co 135.
1 Co 137
Int 430-5

2 Atk 578. This rule stands on two reasons first that the
Pur 355. lord may not be defrauded of the fines &
430. 438. due on the sale of every descent. second that
Morr 348. the devisors creditors may not be defrauded of
their debts for before the 1st of fraudulency
& it was held that the devise was not liable
for the debts of the devisor.

How a devise may fail of taking effect. (93)

Now then reasons have ceased. The rule however ^{Devises} is of much consequence. for if an heir at law ^{2 Bl 220:2} takes as heir the rule of descent is very different ^{Pon: 435:6.} from what w^e have been the rule has he taken ^{2 Ser 127} by devise is by purchase.

In this the rule is to most purp^{ose} not important. for it was always held then that the land in the hands of the devisee is liable for the debts of the devisor & the line of descent is the same whether the heir at law took as devisee or heir. There is one consequence even here of this distinction on act of 1784 the rule ought to be continued. I refer to the case of a posthumous child. For if I S has children living at his death & dies intestate & a posthumous child is born the posthumous son takes with the others. But if a devise to the other children was good heir? be excluded.

Again if one devises to his heir by way of remainder. what the heir w^e have taken as a ^{Str 471} reversion has the devisee died intestate. the heir ^{2 Leon: 101} will take ^{the} reversion as heir and not as devisee. ^{10 Ann 23.}

For the estate is the same in both cases - a fee ^{Co day: 508} simple. ^{3. Ser 127.}
^{1 Rol 616.}

And if an ancestor devises an estate for life ^{3 Leon: 206} only to his heir at law & makes no further ^{Pon: 431:2} disposition of the fee simple. the devise is void. for the estate is the quantity of land which he w^e take by devise & by heirship is the same & therefore according to the gen^{eral} rule he shall be in by descent.

(95.)

Devisees

How a Devise may fail of taking effect,

But if an estate for life had been devised to the heir at law & remainder to a stranger here the heir takes the estate by purchase for this is a diff't estate from that whh he w^d have had by descent.

Bro E 833

919.

Comy 872

Lalk 2411

Stra 1270

1 Bl 222

1 Edw 270

And when a testator devises a fee simple to his heir at law charged with the pay^t of debts or legacies the rule is the same that is the heir does not take by devise for the quantity of interest is the same as he w^d take by descent — charged with

burdens indeed but this makes no difference

Bro 6161.

2 Mod 286.

Comy 872

Lalk 242

Bro E 33. 919

1 Freeman 238.

Pon 433:4.

And if a testator devises his fee simple to his heir at law by way of condition still the prevailing opinion is that the heir takes by descent.

Thus I devise my real estate to my eldest son & his heirs forever on condition however that unless he pays I. \$100 the estate shall go over.

2 Bl 206.

Pon 438:9

This effect results from keeping up this distinction that if a devise is made ^{to} the heir at law whh comes within any of these rules making the heir take by descent. viz that in case a daughter is the heir at law and a posthumous child is born, & that child is a son as the devise is void the daughter takes by descent & therefore the birth of the son takes the estate from the daughter & vests it in the son & if the posthumous child is a daughter half the estate of the elder daughter is taken from her & vested in the posthumous daughter —

How a Devise may fail of taking effect. (6)

Again an alteration in the devise of the Devisees time at wh^{ch} the heir shall receive the estate Poult 430-1 the quantity of int^{er} being the same, does not 434:59. enable the heir to take as devisee. thus if the bonny 272 testator devises a life estate to J.S. remainder to Sack 234-41 his heir at law. this devise to the heir at law is void & the heir shall take the estate after the life estate of J.S. as a reversion by descent

77) But where a limitation to the devisee's bro 431 heir produces an alteration in the course of 3 Lev 127:8. descent. i.e. when the devise makes a diff^{erent} limitation of the 1 Lev 112:13. estate from that which takes place by descent. the heir takes by purchase Poult 439.

Thus if the testator devises land to his two daughters who are his heirs they take as devisees. because the devise makes them 10 tenants whereas if they took by descent they w^{ould} be coparceners. & the case w^{ould} have been the same had the daughters been devised to take as tenants in common. Indeed in these cases the estate is diff^{erent} from that wh^{ich} they w^{ould} take by descent.

So also if one having two daughters who are 60 Litt 167:6 his heir at law devises the whole of his Salk 1472 real estate to one of them she takes the 20 Ray 529 whole by devise & not one half by devise bonny 2123 & one half by descent. for if she took Poult 441 one half by descent her sister w^{ould} be entitled to a moiety of the half wh^{ich} is evidently contrary to the intention of the testator.

Lapsed Devise

Devises.

Co. 130

P. 442.

And a devise may upon the genl principle now under consideration be in part good & in part void. Thus if a tenant in fee simple devises one half to his heir at law in fee simple & one half to his heir in fee tail the devise is good as to the latter but void as to the former.

(98)

1 PM 4397

Sta 25.

2 Km 72

45 C 601

Chou 1340.5

Rec in C 439

Pen 670.7.

Soy 325.

Hllo 107.

(98)

20 R 349

Finally a devise may fail of taking effect by the death of the devisee in the testator's life time thus if A. devises to B & his heirs. and A dies before the testator's death. the heirs of A can claim nothing. for the heirs is a word of limitation.

Further if in this way seen the testator had republished his will after A's death still the heirs could take nothing for the effect of republication is only to give the words used in the original will the same effect as they w^d have had if first written at the time of repub: & if written at that time it w^d have been void as being to a dead man.

But if a charge has been created on the estate in the case now supposed that charge will remain & attach upon the estate. for the charge does not depend upon A's taking it. It is a charge upon the land in the hands of the heir. - for this incumbrance does not depend on the taking effect of the Devise,

Waiver express & implied,

These are all of the cases in which a devise (Devise) may be defeated by

But still the devise may be defeated by Devise 442.3
other means as if the devise waives this Devise 2 Vern 58/
either express or implied. the benefit of it & such 232.3.
waiver may be either express or implied Fall 6/76.

And implied waiver is some act from 2 Madd 40-
which it is inferred that the devisee does not accept
the benefit intended him under the will.

It is a genl rule in equity that if (C. 17)
a devisee having a right to part of ~~that~~
^{a man's estate independent of him}
~~devisee~~ as a matter of right. & to part, only
from the devise as matter of bounty aparts
his right in opposition to the will he
waives the part to which he is entitled
only under the devise. Thus a man
devises certain real estate to his wife instead of
down now if she aparts her claim to down
she waives her right to the devised estate.

Thus again where A owned whiteacre in fee & a
life estate in blackacre remainder to his second son
B. a devised whiteacre to B. & blackacre in fee to J. S.
B was not permitted to claim blackacre unless he
renounced his right to whiteacre under the devise
for where a man devises what he has no power over on
the supposition that his will will be acquiesced in the
of Chancery will compel the devisee if he will take advantage
of the will to take entirely & not partially under it. IV 213. 426.

Now this doctrine of waiver is founded on a
tacit condition that the devisee shall not disturb
the disposition which the testator has made
Fall 6/76.
2 Ves 144. 677
Don 4445. 6
453. 24. -

And it is not necessary to give effect to
this rule that the thing claimed under
the will & that of the will sh^d be of
the same nature -

Real Property (N^o 23)

Devises.

In such cases (see last number) a C of Eq. 2 N^o 314
will oblige the devisee to make his election on a bill filed for that purpose. 2 N^o 676
Pon. 453. 4. 410

We have in this State a Statute prescribing the mode in which a widow shall make her election when she claims property under a will & dower in opposition to the will -

But the rules concerning election hold only where the devise is made a volunteer claiming under the will as matter of bounty in ~~last case~~ 2 N^o 111. 412
2 N^o 677. 30 Pon. 454-8.

Thus if the devise is a creditor he may claim his ~~debt~~ ^{proper right} in opposition to the will & still claim under the will his debt. for the equity will not allow a man to assert a right in opposition to the will & still claim a bounty under it yet that it will allow a man to assert a right in opposition to the will & still claim a debt of justice under it.

If land to which A has a higher claim than the testator is devised to Jd by an instrument not executed as the St requires & a legacy is given to A. A may assert his claim to the land intended to be devised to Jd and still claim the legacy. for the devise to Jd. is no devise, & will not be taken notice of by a C.

1 Ves 248. 307
Pon. 458.

(100) Devisees - How it may fail of taking effect?

1 Ves 12
Per 400:2 But if there is an express clause in the devise that a legatee who disputes the devise shall forfeit his legacy. if the legatee disputes any disposition in the will he cannot claim the legacy. for this is a legacy on condition. even tho' the devise be as in the last case void for want of requisites.

(101)

3 Atk 430 And in all cases in order to oblige the devisee to elect it must be clearly proved that the devisee's taking both interests will defeat the clear intention of the testator.
2 Vern 365.
Ld Raym 438.
2 Eq. Cas 301
1 Ves 130.

1 Wm 95.
Per 470:1 A devise may also fail of taking effect in consequence of the testator performing in his life time what it was the intention of the devisee to accomplish. Thus where a testator devised \$400 for the purpose of completing a building for the devisee but during his life the testator expended more than that sum on the house. the devise failed of taking effect.

2 Bl 378.
3 Atk 434 And finally a devise may fail of taking effect in virtue of the Statute frauds on real devises 34.4
2 De 125. Mm & Mary. By this Statute all devises are void as agt such creditors of the devisee as e^c
1 Wm 129 have taken the land in the hands of the heir. the effect of the Statute is to entitle the creditors to satisfaction out of the land devised when other assets fail.
Per 471:4.
2 De 27.

Before this if the devisee alienates the land *Devisees*
before an action brought ag^t him the land was 2 Bl 378.
discharged from the debts. *Per* 473.

When a creditor su^es out to lands devised for 2 Bl 378.
his debt he must sue the heir & devisee jointly 3 Aik 434.
for the creditor cannot determine in whom the *Per* 473.
title is, & the Stat expressly makes this provision

We have no particular st like the st of France
devisees but our genl statute law gives all the
creditors of the testator a preference to the
devisees.

This English st however affects only the relative 2 Aik 435
rights of creditors & devisees it does not relate 3 Co 124
to the relative rights of heirs & devisees. That *Per* 474.5.
is the st by subjecting the lands of the devisee
does not relieve the lands in the hands of
the heir at law & indeed the lands in the
hands of the heir are just liable.

Devises

How far parole evidence may be admitted to controvert a devise?

Blund 345.

5 Co 68.

6 Co 145.

2 Q. M. 126:7

141.

1 V. 65.

3 Col. 318.

Pol. 478. 513

"Evidence"

The testator's parole declarations can't be given in evidence to controvert ^{the construction of} the words used in the devise or to give them an import w^h they can't on the face of it bear. This rule has prevailed every since the 1st of wills, & obtained in case of wills at com: law, & is founded on the doctrine that the language of a deed can't be controverted.

Parole evidence has sometimes been allowed to vary a ^{man's} prima facie import of words.

2 Bl. 671

Pol. 478.

Now a testator's declarations may relate to the devise or to the devisees but in both cases these declarations are inadmissible in gen^t when they relate to a question of construction on words used. Thus

4 Co 445.

Ed. 438.

1 Eq. ca 219

Pol. 480

II. If one devise to his wife for life generally, parole evidence is not admissible to show that he intended it instead of downer. vide post 120.

2 Bl. 122

2 Vern 333.

Pol. 480

Pol. 488.

1 V. 231.

So where one devised an estate on condition letters written by the testator were not admitted to prove that according to his understanding the conditions had been broken.

So where one devised real estate to his daughter Devises,
 parole evidence was offered to prove that it was 2 PM 316
 the testator's intention that it sh^d be for her 1 Ves 189
 sole & separate use but it was rejected. Every 2 Atk 216. 373
 such intention must be part of the devise Pon 484
 itself.

Where a testator had previously named 2 Ves 216:77
 in his will two females & afterwards said I devise Pon 580.
 to her such property in this case parole evidence 6 Ves 472
 was not admitted to show wh^{ch} of the two Pon in 684
 the testator intended. The ambiguity here Pon 485:6.
 arose on the face of the instrument. Plow? 345.

27/ But as to what are called matters of fact or Palt 240
 latent ambiguities the genl rule is that parole Pon 475.
 evidence is admissible to ^{explain} them if the proof 512. 521:25.
 is consistent with the terms of the instrument 2 Ves 216.
 but not to contradict the language of the instru

Ex gr^a. a devise to his son & he having two 5 Co 18:6.
 sons of that name parole evidence was admitted 8 Co 155.
 to prove that the younger son was intended & 1 Ves 231
 his declarations in such case w^d be admitted 2 PM 137
 for the ambiguity, was latent on the face of the Pon 488:9
 devise all was clear & in such cases circum- 495-7.
 stantial evidence as well as direct evidence 1 PM 674
 is admissible, 650 671
 2 PM 137

(108).

Parol Evidence

Devise

8 Co 155 So where one devised the manor of S. having two manors of S. parol evidence was admitted to show whh of the manors was intended.

Per L. 451. 92.

3 Re 6310

1 Mod 117

Per L. 490.

So parol evidence has been admitted to show whether a given instrument was intended as a will or a deed. Done

Now this was admitted on the principle that it went to the execution of a given instrument as much to the execution, as the fact of signature.

But if on the face of the instrument there are words of present grant such evidence is inadmissible.

Salk 7

1. 444 411

2 Br 111 156.

6 Mod 100.

So where a devise was made to A B & there was father & son of the same name parol evidence was admitted to show that the testator did not know the father, whh was admitting circumstantial evidence to explain a patent latent ambiguity.

60 Ltt 1. 35

11 Co 21. a

6 CR 671

Per L. 337. 340.

405. 7. 498. 9

46 m 35.

Co Litt 3a

And where a devise is wrongly named & sufficiently described parol evidence was admitted to show who was the person intended. C. W. P. says that this is not the rule as to deeds, but it says the rule is the same both as to deeds & devises —

To where one devised to the four children of AB Devisee.
when in fact she had six four by one husband & two by another.
parol evidence was admitted to show that the four by the first husband were included.
Here the ambiguity is latent.

But a devise to one of the sons of A he having several cannot be explained by parol evidence, the ambiguity is on the face of the instrument. -

- 10/ If the person described as devisee applies to one & the name applies exclusively to another parol evidence it seems is admitted to show whether the name or description shall govern.
As to J. the eldest son of Thomas & there being J. not eldest son of Thomas &

And where a testator gave a legacy to a person by a wrong name. parol evidence was admitted to show that the testator used to call her by the name mentioned in the devise. Here it might be alleged that the legatee was known & called by her wrong name &c,

(111)

Parol Evidence

Devise

2 Ves 27.8

Poul. 500.

Still if the person wrongly named as devisee is not discreited at all except by the wrong name. It is said that no evidence can be admitted to show who was intended. but this case comes very near the last.

Here the evidence is not consistent with the term of the Devise

If it could be shown that John meant John Devisee, evidence would be admissible.

Ho 6 32

Eq 337

Poul. 340

But notwithstanding the genl rule respecting patent ambiguities yet it is said that if the term used is in itself equivocal parol evidence may be admitted to show what was intended by the term used.

This rule may perhaps be reconciled to principle by analogy to the case where a foreign word is used in whh case parol evidence must show to the court the meaning of the word,

In these cases however parol evidence is not admitted to give words in the instrument a meaning whh they cannot bear ^{from the face of the devise.} thus the word son has been sometimes construed to mean a grandson where he had no son but a grandson. but where the designation is my son & it is evident from the instrument that the word son was intended to apply to a son & not a grandson parol evidence was not admitted to show that grandson was intended.

Thus where a man devised land to his son & a Devisee legacy in the same instrument was given to a grandson. parole evidence was rejected where 2 Mod 715. it was offered to show that son meant grandson. 140 son. for as the testator had once used the word grandson the Ct. thought it inconsistent with the devise to show that the testator used son & grandson as synonymous. Ray 405 11.

- (113) ✓ Parole evidence is never allowed to supply what the will omits for to allow this w^d be to allow a will to be made by parole. besides 2 Eq ca: 415. the uncertainty is patent. 2 Atk 246 Don 523, 501 2 Eq ca: 415.

Where the testator gave directions that all his estate should go to his executors but the clause was omitted by the scrivener parole evidence was rejected whⁿ was offered to show that the testator gave directions that the clause sh^d be inserted, "voluit sed not dixit" 2 Eq ca: 415. Don 523.

If such evidence could be admitted a will might be made by parole,

(114)

Parol evidence

Devise Ho 6th of law & equity have admitted parol evidence
 3 Feb 44 of extrinsic facts ^{to explain term} two meanings as
 Cou 5024 to the quantity of interests, provided this proof
 5025 stands with the devise. This proof of the testator's
 circumstances i.e. has been admitted where a
 term of equivocal import, was used -
 e.g. the devise was all my estate to A
 he paying my debts - parol evidence was
 admitted to show the deficiency of personal
 assets & that of course a fee was intended
 to pass.

270 412 But it will be unnecessary now to admit parol evidence
 170 412 in the case just stated to explain the word "estate"
 270 557 for the word estate non ex vi termini carries a fee
 470 93 where the testator has a fee - "estate" means
 570 562 non prima facie at least "interest" -

670 34

870 675023. 1070 559. 1070 344.

870 503

2070 251

370 356.

570 558

670 175

170 447

(115)

270 290 Valued to ascertain the quantity of int intended
 300 1897 proof was formerly admitted as to the value of the
 Rec in Ch 71. land devised as if one devised all his land a
 Cou 506:7:13. he paying to B \$100 per annum proof was admitted
 to show that the sum charged exceeded the annual
 value of the property given.

But it seems now well settled that a devise of Devises
land with any words of limitation charged with the
 the pay^{ment} either of a gross sum of an annual sum 6 Co 16
 carries a fee of course & that there is now no need
 of parol evidence concerning the value of the
 lands.

3 Burr 1623-3 Burr 1533 2 B & P 250:1-1 B & P 558 4 East 496

The principle is that if the devise sh^d take only
 a life estate he might be a loser but the devise
 is always presumed to be the object of the testator's
 bounty.

3 Burr 1622

The value of the land then appears not
 in such ^{cases} to be at all material.

In this case too if the devise except the
 gift he binds himself personally for the pay^{ment}
 of the charge created by the devise

2 NR 344

2 B & P 250

But still there is a distinction between
 cases in wh^{ch} the charge affects the person &
 devise in wh^{ch} the charge affects only the
 lands for in this last case since the devise
 cannot be a loser by taking a life estate he
 only takes an estate for life

5 T 81

2 B & P 250

4 East 508

5 Do 92:6-8

Under a devise of "land" to a he paying
 proso. or my debts from the profits thereof
 & takes only an estate for life. for here
 are no words of inheritance & if the
 devise takes only a life estate he cannot be a
 loser for he is bound only to the extent of the
 profits.

6 Co 16

3 Burr 1541:2

1623.

Couf 239

2 B & P 250:2

2 NR 343

341-350.

Devise,

2. R 350

Where the devise was that I give my land to A. my debts & legacies being paid thereout this was formally held to carry a fee.

2. R 352

2. R 349

5 East 13.

3 Burr 1544

This does not appear to be consistent with the last rule. for the word 'thereout' was probably used by the testator in the same sense as "out of the profits of it". But the distinction is this in the last case, it is a residuary legatee & equivalent to this I charge my land with the pay^t of my debts & legacies & the land wh^{ch} is not necessary for this purpose I devise to A. & he takes a fee because he is the person to sell the land, & he cannot sell without having a fee simple -

5 East 1793

(2. R 350)

~~But~~ In a late case a devise of land to A. he paying thereout &c. it took a fee. for he paying thereout means he paying not out of the profits, but out of the land, he therefore must sell the land but where the land is to be sold, the devise must always must have a fee.

5. Burr 4

533.

6. R 175.

5 East 14

4. Burr 144

2. R 347

(3 Burr 551.

But where the devise was of "all the rest of my lands ten^t to A & B after pay^t of debts" A & B was held to take only an estate for life for here A & B was not to sell the lands & therefore A & B had nothing to pay. & he takes not the whole land at all. It is not a devise to be subject to the pay^t of debts, but it is a devise of the lands after the estate have sold enough to pay the debts.

Again proof may be admitted concerning the Devise,
situation of the testator's family to ascertain
the explanation of a term whl may be a word
of purchase or of limitation (See Estates).

As to his children, proof is admitted
to show whether he had children at the time
of the devise, maior. The proof must not
contradict the words of the will,

And evidence has been admitted as to the
state of the testator's family for the same purpose
is to ascertain the meaning of words not
strictly equivocal in themselves but whl considered
with reference to the testator's property will bear a meaning
different than prima facie import

Thus in the case of the Bell Tavern whl was sold 234
thus J^s devised to a ^{key} house called the Bell
Tavern the fact was that the devise was
tenant in land of the house & J^s had only
a reversion. the C^t held that the ~~devisee~~ devisee
took a fee, for it could not have been the intention
of J^s to give a life estate for that a already had

Thus the case of Foncrooy & Points in whl
evidence was admitted as to the state of the
testator's funds to ascertain the meaning of
the words "sum" used by the testator.

Parole EvidenceDerises

2 W 216

Pon^t 524

4945. 512

In all these cases however the evidence must stand with the words the perhaps not with the prima facie meaning of the words. If the words can not bear the meaning intended to be put upon them, parole evidence will not be admitted to put that meaning upon them.

Talb 240

Stra 1261

Pon^t 523.2Pon^t 5211

Parole evidence was not admitted when the testator devised ^{all the resid. of} ~~all~~ his estate to his executor & when the testator was owed by the ex^r \$1000 - to prove that the testator intended to forgive the debt. because inconsistent with the legacy of ^{all the resid.} so when the residuum of the testator's prop^y was not disposed of at all no evidence was admitted to show that the testator intended that the executor sh^d not have the residuum.

But in Chancery & there only parole evidence is admitted of the testator's words to rebut an equity, or just an implication, i.e. an equitable implication.

This is a gen^l rule in equity, applying to all cases as well as ~~as~~ ^{as} those of derises, in which a person by a bill in Equity claims an equity which is diff^r from the disposition with the law or make.

To pursue this subject further.

Devises,

Where from the face of the instrument an inference is raised in equity in favor of any person, parol evidence may be admitted to rebut this equity, so as to leave the instrument as it stands at law. -

Ray 24/1324

1425320-

Pos. 5256-
2 Ex. ca 506.

Thus land was devised to an ex'r for pay^t of debts but there was a large surplus & at law this surplus belongs to the ex'r but in equity consider the ex'r as to the surplus only as trustee to the heir.

But on a bill brought by the heir parol evidence was admitted that it was the intention of the testator to give the surplus to the ex'r.

To illustrate. A entered into articles to sell property to B for a given sum. But A afterwards made several qualifications lessening the price. A then brought a bill to enforce the sale. B was allowed to produce parol evidence of the qualifications. for this evidence instructed the conscience of the Chancellor whether he ought to proceed or to leave the parties to their remedy at law. - The evidence is not admitted to controul the instrument.

Parol Evidence,Devisee,

2 Vern 677 to his ex'or. & the question was whether parol evidence
 Fall 79 sh^d be admitted to show that it was the intention of
 Cou^t 527.8 the testator to give the residue to the ex'or. it was decided
 in the ex'or's & that because the ex'or had been in
 the will that it sh^d not. but in the house of lords it
 was decided that it sh^d be so? in favour of the ex'or's title

1 Ves 323.

Cou^t 529 On the same principle evidence not contradicting
 the will was admitted to show that a devise
 This was an ~~agreement~~ made as the execution of an agreement
 was discharged made by the testator to the devisee. Thus a B
 at law by the agreed to settle \$100 per annum on his wife.
 informance the wife has only in his will he gave \$100 per annum. parol evidence
 an equity when might be admitted was admitted on a bill brought by the wife for the
 had this been executed this performance of the agreement that the devise was intended.
 evidence could not be admitted as an execution of the agreement. - This evidence is
 ante 105. - not admitted, to affect the will but to prevent double

2 Vern 506. atiff

Cou^t 530. counteract fraud. Where a person devised his real
 estate to his ex'or & omitted to charge \$100 on the
 land in favour of A. because the ex'or promised
 to pay it. evidence was admitted to prove this
 promise by the ex'or. for the purpose of counteracting
 the fraud of the ex'or. It is be useless to say that
 fraud shall invalidate an instrument & at the
 same time refuse to admit parol evidence
 of the fraud, the fraud will never appear
 on the face of the instrument.

Revocation of Wills.

Wills & devises & all testamentary dispositions of property are ambulatory until the death of the testator. the death of the testator consummates them. Every will.

Revocations as the statute it com. law is as they stood before it of frauds, were of two kinds express & implied. If express revocation is one expressed in terms & before it of frauds it might be either in writing or by parol. thus a will might have been revoked by an executed or by a subseqt will expressly revoking it.

By parol as if the testator says 'I revoke my will' &c. &c. this before the st was a sufft revocation even of a will in writing.

Don 532
Roll 618
Don 1682. 533
Cro 115. 407

In cases however of parol revocation the animus revocandi must clearly appear. as if one says in haste or in passion I revoke my will this will not be sufft. & solemn deliberate intention to revoke was necessary.

What importing an intention to revoke in future do not even at com. law revoke a will. as "my will shall not stand for I will alter it." if the will was not subseqt altered, it will stand. The words do not import a revocation.

But will such a declaration in writing after the st revoke the will

2 East 435
1495.

(123) Implied Revocations,

Devisees

12d 73.

12d 753.

Donl 532.

The implied revocation may be by some act or omission not expressly revoking or by some act from which it is inferred that the intention of the testator is changed. Thus if one having devised to a stranger says animo revocandi my son shall inherit this is an implied revocation & before the act of fraud would if said in words be sufficient to revoke the first devise.

Donl 535.57

The act manifesting an intention to revoke in present or furnishing an inference that the intention of the testator is changed. may be either by writing or by matter in paris. matter in paris here means words as contradistinguished from an instrument in writing.

(124)

3 Mich 512

3d 206.

Donl 535.6

Thus if one makes a devise inconsistent with a former tho' not expressly revoking, the ^{latter} ~~former~~ will revoke the former as far as they are inconsistent. As if one devises all his estate to two & afterwards to one of them. the latter devise revokes the former & the one takes the estate.

bro Eq.

Donl 6.444.

2d 374.5

1 Vern 30.

9 Mod 522

2d 2.9.10

3 2d 493

It is held however that if one devise his estate to A & in a subseqt part of the same instrument devises the same estate to another then two take as jt tenants. But this seems to be a doubtful point. -

(Co Litt 112 b. 2 2d 374) 3 Atk 493. Co Litt 112 (f) in note 113 a in note.

Implied Revocations,

(125)

Still in the case of a specific legacy to A (Devisee)
& in the same instrument to B afterwards B 22th 375
the subject legatee will take the whole.

But if there is any thing in the will by
wh. the intention can be discovered the intention
will govern notwithstanding this rule —

The rule ought to be the same as to real &
personal propy. It is a question of intention —

But a subject devise not containing express words Haro 374
of revocation will not revoke a former one unly 3d ed 203
the latter is inconsistent with the former & no Comb 90
further than it is inconsistent with it. Salk 592

The mere fact that a subject will is made,
is not suff. to revoke a former will, Comp 87
Pou 536. H
= BLR 937

25 And where on such an issue the jury found (H. 6)
that a subject devise was diff from the former 2 East 488
but in what respects they knew not the Ct 1 Be Pl 364.
held that they could not pronounce the
former to be revoked —

The law has the onus probandi.
in such cases.

Mr. Poul. supposes that if the jury found that 2d 540-41
the devise was in^{ca}sistent with the former that
the devise first made w^d be bad. but the
inconsistency is a matter of law & therefore J.
thinks that Poul. is wrong. If the jury sh^d
find that there was a total inconsistency
this might alter the case tho' J. thinks
it w^d not. for the jury might consider
two devises inconsistent wh. a jury^{or} might
judge consistent,

1261

Implied Revocations,

Devises

3 Atk 550

1 Ves 32

Pol. 541

A codicil too when inconsistent with a former will revokes pro tanto the former will

But there is a distinction taken between the revoking effect of a codicil & the revoking effect of a subseq^t will. viz that a codicil being part of the will & not in its own nature a revoking instrument will ~~not~~ only in the degree expressed. Whereas as I say a subseq. devise varying a previous disposition is a total revocation.

Pol 344.

Thus land was devised to three trustees to a charitable use, by a cod. the same land was devised on the same trusts to the same trustees & two others. here the rule is that the trust is not revoked. the only effect is to modify the authority originally given to them by giving it to five. Whereas it is said that if instead of being a cod. this had been a subseq^t distinct devising instrument the first would have had no effect & the trusts would have been executed according to the latter. The practical diff exists in the mode of pleading. in the first case the trustees must plead under the will & cod. in the latter they must plead under the latter will alone.

Real Property § 24

Devise

If one makes a second devise inconsistent with the former one, under a false impression *Pon 546*. as to a matter of fact which furnished the motive to the second devise. If this motive is expressed in the subsequent devise, & if after the death of the testator it is found that the fact supposed by ~~test~~ by the testator & which furnished the motive to the second will the first will is not revoked. —

Thus a man devised land to A & in a subsequent instrument reciting that A was dead he devised the same land to B. — after the death of the testator A was found alive & it was held that A took under the first devise. — This differs from the case (ante) of a devise to a younger son on the supposition that the elder was dead 1st because the death of the elder was not there recited & 2^d *Pon 546* In this case

If the second devise is to B whom he calls his wife but it is found after his death that she had a former husband living when the devise was made & that he was ignorant of that fact. a former devise of the same property will not be revoked. — 2^d we must the *Pon 546* In this case a revocation is declared void because founded on a mistake in the former case it was held to declare a will void because founded on mistake —

mistake to render the devise void arise from any deceit practised on the testator *Pon 546* I think not.

Where a former devise is revoked by a second *4 Burr 252* merely on the ground of its being inconsistent *Pon 549* with the former, the second devise is ambulatory *Park 5479* until the death of the testator. — & if the second devise is subject destroyed the first will be good.

Revocations,

Divises But it seems that if the second devise had
 Comf 53. expressly revoked the first, a revocation of the
 Doug 10. second will not establish the first. for here
 Pont 551:4 the revoking effect does not depend on the
 2 Ball 266 inconsistency of this with the former. & by this
 3 Conn 576. express revocation the former is immediately
 revoked tho the disposition in the second will be
 revoked afterwards.

4 Burr 2512

Comf 92

This point is not however expressly decided.
 But the reason seems to be that the revocation
 when express is a substitutive act & acts in
 presenti. In the implied revocation the Revoca-
 tion arises from an inconsistency which is destroyed when

(130)

the second devise stands. But implied revocation may be by matter
 Pont 554:65 in fact, by some collateral extrinsic fact—

First by an alteration in the domestic
relations of the testator.

Secondly by an attempted alteration
 in the estate devised or by an alteration in fact—

4 Burr 2171

2182.

13 Mm 304

12 Cy. cas 813

Doug 55.

Salk 592

1 Will 243.

1 W. 171

Ed Ray 244

2 B. 376

First if a man while unmarried makes a
 will afterwards marries & has a child by
 the marriage the prior will is revoked.

but there must be both marriage & the
 birth of a child. If then a married man
 makes a devise and afterwards has a child
 the will is not revoked. & if an unmarried
 man marries after having made a devise & has
 no child the will is not revoked.

This rule holds however when the child is Devises
posthumous. (Murray v. Leach 25 Gratt. 130) 502.49

I.E. Marriage & the subject birth of a posthumous
child are an implied revocation,

In this state by it the subject birth of a child
alone is a revocation of a former devise unless
the will provides for such a contingency.

The reason of the com. law rule is said to
be that from such a change of domestic circum- Long 81
stances a change of intention can be presumed. For 557-9.

But it seems to be admitted that any evidence For 556.9
written or parol is admissible to prove that the 189. ca 413
devise shall stand. for parol evidence is admitted Long 81-5
to give effect to the will & to rebut a presumption. Ray 7. 411
arising from extrinsic facts. Every presumption 3. 418 522
de facto may be rebutted by parol evidence. 2 East 530
543.4.

This rule has been doubted 5 Ves. p. 448. 664. i.e.
it has been doubted where the deviser of the testator
are admissible,

The reason given however for the rule that a 5 Ves. 58.9
change of domestic circumstances &c. is not
broad enough. in in the case of a posthumous child
if at the death of the testator such a child was expected
by him and it sh^d happen to be an abortion. the devise
is not revoked & yet in expectation of this child the
intention of the testator may be presumed to have
been changed. Besides an intention is not suff^{ic}
"voluit sed non dixit." -

Implied RevocationsDevise

52 R 58. La Henry says that there is a tacit revocation
 63. annexed in contemplation of the testator to
 2 East 581.2 every devise that he does not intend that
 the devise shall not take effect unless if
 there is such a change in his circumstances.

(134)

2 East 541.2

Poul 540.

556:7.

1 Eq. ca 413.

There has been no case decided in w^hl the
 two subj^t events of marriage & the birth of
 a child have been held suff^t to revoke a
 former devise unless the whole estate is devised
 by the former will.

1 Eq. ca 413

And it seems too that if the wife & child
 Doy 38.110. are well provided for either by the devise itself
 Poul 556:7 or by his leaving part of his prop^y intestate
 560. that then circumstances of marriage &c will not
 int to a revocation. The presumption of a
 tacit cond^o is not annexed.

Doy 39

2 East 580.

And clearly subj^t marriage & the birth of
 a child are not suff^t if the devise is made
 in contemplation of these events, and making
 provision for them. For it w^d be absurd to
 hold that a devise is revoked by the
 happening of the very circumstances, or
 w^hch it was intended to take effect

Implied Revocatory (135)

Thus if a man makes a devise to such wife Devises
as he shall afterwards marry & marries her & leaves 14y. ca 403
a child & a legacy was given to his brother Pow. 556
the legacy was not revoked for provision was here
made for the family & the whole estate was not
disposed of to a stranger.

But if a feme sole makes a devise & marries
her marriage alone is clearly a suspension of the 4661
devise during coverture. so that if she dies before 1 Jac 29.
the death of her husband the will is clearly revoked 2e Ben & femore
for it is an essential requisite or quality of 4 Ves p. 160
every devise. that it be in the testator's power Pow. 563.
to confirm or revoke it. but a feme covert
while married can do neither & therefore the law
revokes it for her - or at least suspends it,

But if the wife in this case survives the husband 4 Ben 2513
& if come becomes capable of revoking a confirm. so 21 Jac
ing. if she does neither is the will valid? 22 R 692 arg.
(Plowd 343. Pow. 564. say it is) 2d? Longon thinks
that the will does not stand. 4 Ben 2513 arg? 21 R 499 Chn
shows that it is void. But J.G. thinks that 22 R 689.
the true opinion is that the devise is good Pow. 173.
for she is capable of making a devise at the 'trust'
time of making it & at the consummation.

In this st. the last question cannot arise
for by our st. law she may make a devise
during coverture.

Implied RevocationsDevises

In the other hand an alteration in the natural capacity of the testator will make him incapable of confirming or revoking ⁸³⁹ not effect the will. for no change of intention can be supposed in this case. nor is there here ground to apply this original condition. — for we are now not supposing a case in which there is marriage &c after the devise —

2 A devise may be revoked by an actual or attempted alteration in the property devised after the devise made.

2 Atk 579

1 Bos 574

Don 565

52 607

When the revocation is by an actual alteration of the estate after the devise made. the revocation is of positive law & is not founded on any supposed alteration of intention in the testator.

But when it is the consequence of an attempted alteration the revocation is founded on the testator's intention to revoke.

Pon 134.6.566

(11.)

75 R 399

2 Atk 576

1 B & P 576

1 Atk 421

The former rule is that an actual alteration revokes the devise is on the principle that the devise must be seized at the time of the devise made & must continue seized either in fact or in contemplation of law until his death. Now the alteration of the estate breaks this seizure & any alteration in the facts will put the estate in a different plight from what it was at the time of the devise made revokes the devise.

Such an alteration may be effected either by Devises the devise. or by the act of another or by law.

1 By the deviser. If he alienates the land devised. - 1 Roll 605

If he makes an alteration in the legal estate only retaining the beneficial interest after devise made. - Thus tenant in fee makes a feoffment after devise to the use of himself from this feoffment he holds the land by a new limitation & therefore the devise is revoked. for it is precisely like a devise made of lands before they are purchased.

Don. 567

1 Wilson 311

7 JR 399

2 Ves Jr 447

4 Burr 1980

1 BR 576.

4olt 253

2y 143 276

(1 Showa 923 13 592)

(140) So if one devises land & then alienates the land & takes a reconveyance the devise is revoked. He now holds the land as a new purchase

1 Roll 66

8 Co 90

1 BR 576.

Don. 567

2y 143. 1 alt 576.

And where one having devised the land after will made a marriage settlement limiting the estate to himself & to his ^{his children & remainder} heirs. It was held that the devise was revoked. - For the testator held by a new purchase.

7 JR 399

Don 509.

And where one suffered a recovery of land to the use of himself it was held that this revoked a devise of the same land - For under the recovery he takes as a new purchaser

2 alk 330

3 Milm 6

2. K L 401

7 Br 86177

Don 570 2

(141) And the same rule applies as well to equitable as to legal estates. If therefore a man after having devised his eq. of redemption conveyed it to himself by fine & recovery the devise is revoked

1 Eq ca 111

2 alk 744. 579

Don 503.

Pa 572. 5.

4 Burr 1461

Contra (Long 722 C)

D. Implied Revocations

Devises

And a subject alteration upon an estate before devised even tho' the alteration itself is necessary to make the estate devisable.

3 Ler 108
3 P Wms 163
7 Cr 406. Thus where tenant in tail devised his estate 2 H Bl 523 & afterwards conveyed the estate to J. to 2 Nov 2401 the use of himself, the devise was not strictly revoked. 10 Cr 558. but it was held to be void.

(142)

3 P Wms 170

2 H Bl 341

10 Cr 558

1 H Bl 614

And if a man covenants to levy a fine to the use of such persons as he shall name in his will & then makes his devise & afterwards levies a fine the devise is revoked by the fine

3 H Bl 371

2 H Bl 587

7 Cr 379

10 Cr 552

10 Cr 550.

And so strict is this rule that where the subject alteration is expressly devised to be for the purpose of giving effect to the devise the devise is still revoked, for the intention has nothing to do with this rule. The rule of course supposes the alteration such that the test^r holds as by a new purchase.

(143)

3 H Bl 534

2 H Bl 522.

10 Cr 532.3

And when a man actually seized in fee but supposing himself tenant in tail, suffered a recovery to confirm his devise this was held a revocation.

2 Cr 593.

Dec in 61319

2 H Bl 411.

10 Cr 556.

1 P Wms 575

2 Cr 168

3 Cr 163.

And the case is the same as to a specific devise for a lease for years with a remainder ex gra. At a man having a lease for 50 yrs. unrevocably devises it specifically, this lease for 50 yrs. & then renews the lease, the devise is revoked, but here the reason is not the same as before for here the testator's words do not include the renewed lease.

But if a man devises all the lands & will he Devises.
 shall see payed all the lease will be owing at his death will pay. therefore if in the last case the will
 had been all the lease of which I should die payed the
 renewed lease would have payed.

3 Atk 74.7

149.

Silk 237

18 Wm 575.

Per 584/90.

(145) Still when the revocation of a prior devise
 depends on the simple fact of a subsequent alteration
 there must be a substantial alteration. or there
 is no revocation.

✓ In this principle it was formerly held that
 if one having lands in fee devised them & afterwards sold
 covenants to convey them lands. the land is
 covenant is no revocation and this is now the
 rule at law. but in equity if the covenant is
 such as that it will enforce it. this covenant
 is a revocation for in equity the covenantee has
 a title to the land,

22 C 349

Per 5755

20 Wm 329

624.

(146) But a devise of an equitable interest in a
trust estate is not revoked in equity by a change
 of trustees. Thus A holds land in trust for B & C
 his & B having devised the land. causes his trustee
 to enfee other trustees to the same uses. this
 change of trustees does not in equity revoke the devise

Per 575.6

1 Ch R 23.

2 Do 209

For this change of trustees affects only the
legal estate & B only devised the equitable
estate —

Implied RevocationsDevises

- So if one having contracted for the future purchase of land & then devises his estate & then completes the purchase the devise is not revoked for the equitable interest remains precisely as it was before. At law the devise w^d be at initio void - but in Equity when the devise was made the testator had title & now he has only ^{taken the estate home.} And it is now a gen^l rule in equity that if a person having an equitable estate in fee devises it & then takes a conveyance of the legal interest the devise is not revoked.
- Thus if a merchant devises his equity of redemption & afterwards pays the debt & takes home the legal estate the devise is not revoked.

And where several successive instruments taken together constitute but one conveyance in law a devise made between the time of the execution of the first instrument & the completion of the last is not revoked. for the consummation has relation to the inception & the devise is therefore made in law after the conveyance.

- Thus the deviser makes a conveyance to himself for the purpose of suffering a recovery & then makes a devise & then suffers a recovery to his own use this devise is not revoked by the subsequent recovery for this subsequent recovery takes effect by relation at the time of making the deed to which the use & therefore no alteration in the estate is made after devise made.

A mere partition between tenants in common or Devisees coparceners does not revoke a devise made before Reg. 240 the partition. For the partition makes no alteration it merely ascertains what belongs to each. 3 P. M. 170. n. 10. 602. But if the deed of partition alters the estate 3 K. 137 this deed would revoke the devise - The rule 1 Sid. 90 supposes that the partition is confined to 1 W. 309 that one object. If the deed of partition 3 Atk. 742. 15. extends further than this & makes a disposal of the property 750. Con. 603.

Here one has made an actual alteration in an estate before devised no parol evidence & 2 Atk. 516. no evidence is admitted to show that the 3 Atk. 741 testator did not intend to revoke the devise 2 Ves. 417. 575 for if the intention was clearly expressed on the face of the devise still it will have no effect. These rules are not founded on the intention of the testator.

A devise may also be revoked by an unsuccessful attempt to alter the estate devised. Thus if Con. 605. one after having devised his estate attempts by deed to convey away the estate but the deed fails for want of requisites or for want of capacity in the testator, grants to take, this deed is ineffectual 565. and revokes the former devise. This rule is founded on a supposed alteration of intention. - The devise is prima facie revoked.

But a subsequent ineffectual devise of the same estate will not revoke a prior one because the subsequent devise does not attempt an alteration in the estate until the testator's death. the testator indeed is presumed to take away the estate from the first only on condition that the second shall take.

Implied RevocationsDevises.

If one makes a deed of feoffment after devise
 of the same estate but without livery of seizen.
 the the feoffment is ineffectual yet as it manifestly
 an intention to revoke the devise. it will be revoked.

1 Bl R 349.

1 Wils 175. 157

Pur 603.

Green 96

But as such revocations are founded on the
 presumed intention of the testator. the inferred
 revocation may be rebutted by parole. Thus if
 the testator declares that it was not his intention
 to revoke. parole evidence of such declaration is
 admitted

When an attempted alteration ^{by devise} is ineffectual thro'
 the incapacity of the devisee to take the prior
 devise is revoked. The last devise in this case
 tho' inoperative as such shows an intention to
 revoke. & the last devise is here supposed to
 be executed properly according to the revoking
 clause - If one having made a devise makes
 a grant of the same estate to the wife the grant
 tho' void at com. law will yet revoke the devise

1 Roll 416.

Pur 620.

If the grant to the wife was of a reasonable
 part of the hus. estate a b. of eq. would support the
 grant & therefore the devise only in part revoked.
 (in Equity). (Quare)

Eya stranger, —

Derives

Thus if a stranger dispeizes the testator & continues the dispeizen until the death of the testator the devise made before the dispeizen will be revoked. or rather this devise is void,

1 Roll 416
11 Co 57a 46.
Holt 7448.
Pon 26. 1745 51
667. 674.

But a stranger cannot revoke a devise by leaving or cancelling of it if it remains legible.

2 Vern 444
Pon 612. 152

And J^d thinks that if the devise were destroyed by the wrongful act of a stranger still it w^d be good if its contents c^d be discovered by a duplicate or by parol. This has been determined in a still stronger case in Court where the donor being insane tore his will. the contents of the will being proved by parol it was held that the devise in the torn will took — (Medley's case Fairfax)

3 Atk 6489.

a devise may be revoked absolutely or constitutionally or in whole or in part. Revocations have heretofore been considered as absolute.

Thus if one having devised his estate mortgages it even in fee the subject mortgage is in Equity only a conditional revocation pro tanto if the mortgage is discharged the devise takes the estate absolutely.

Pon 614—
1 Vern 329
Salk 158.
3 Atk 748. 505
20 Mm 329

This w^d be at law an absolute revocation for at law there is a total alienation in the estate but in equity there is no alienation of the feehold — If the mortgage is not discharged it is a revocation pro tanto. & the devisee may have the land on paying the debt —

Ld Ray 2965.

A mortgage is no sale it is a mere pledge. & the mortgagee's interest is personal property.

1847.

Implied Revocations

Devise And if one having devised his real estate
 2. 11th 148, 272 makes an absolute conveyance of it to a
 Prec. in Ch. 32 creditor, that he may sell it for the purpose
 2 Nov 241 of satisfying the debt & account for the
 3 PM 344 surplus to the testator & if the testator dies
 1 Eq. ca. 410 before the sale, the devise is revoked only
 Pon. 619- pro tanto in equity. for this conveyance
 tho' absolute in terms is yet in fact condition-
 al & the transaction is nothing more
 than the testator giving a power to sell
 & the devisee by paying the debt may
 take the estate.

If indeed in this case the land had
 been sold by the creditor during the testator's
 life time, the sale w^d have been a revocation
 quoad the land at least whether the devise w^d
 be in that case entitled to the surplus is doubtful.

750 410 But a mortgage for years is even at com: law
 3 11th 748. only a revocation of a prior devise in fee, only
 Pon. 617 for the term & the reversion is in the devisee.
 & in equity it is only a conditional revocation
 pro tanto & in equity the devisee by paying the
 mortgage debt will take the estate in fee free from
 the incumbrance of the term, immediately on the
 death of the testator, tho' at law he could not take
 the estate until the expiration of the term.

Dec. in Ch. 174 A mortgage whether in fee or for years is
 Pon. 618: 19. made to the prior devisee a total revocation
 both in law & in equity. On the principle
 that a devise & mortgage are inconsistent.

5 Nov 1417. 111 This doctrine has been since denied in toto
 11th 186. & it thanks very properly denied.

Revocations

A partial revocation may operate either by diminishing the quantity of land devised or the subject matter devised. Devisees 23. Hence if one devises in fee & afterwards leases to H for life 1 R. 2616. the devise is revoked only for the estate for life, this is Don: 624:6 no alteration in the fee is contemplated in the former rule for here the lease for life is only partially inconsistent with the devise in fee.

And if one having devised an estate on condition afterwards strikes out the condition the condition only is destroyed & the devise becomes absolute. Don: 624

If one devises to A in fee simple & by a subsequent instrument devises to A in tail the latter is a revocation of the former only to the extent of the difference between the two estates. i.e. A takes only an estate tail. Comp: 90 Don: 624:6

A subsequent lease to a stranger for years to a stranger is a revocation of a prior devise in fee only pro tanto -

But if a subsequent absolute lease is made to a prior devisee is a total revocation. On the principle that the two estates are incongruous. This rule only went to the case in which the lease was to take effect on the testator's death. Don: 624:7

But this rule is now denied & a lease to a prior devisee is now no revocation - 3 Ves: 600. 417 5 Ves: 556.

Revocations under the Stat of frauds

Devise If one having devised his estate in fee simple
 may p. 117 to a. afterwards make a lease to a. the
 5 Do. the testator's creditors cannot take the lease tho' they
 may take the reversion. - In the previous
 is taken by the testator.

117
 2 Ven 720 If a devise may be revoked in part as to the subject
 1 Co. ca 412 matter. If one devises three farms to A & makes a
 3 Atk 208. subsequent devise revoking one of these farms the devise
 2 Co. ca 71 is good as to the other two farms.
 2 Co. ca 627:8.

I have hitherto treated of revocations with
 reference to any Statute. In the St of frauds
 there is a clause on this subject

viz. that no devise shall be revoked other
 wise than 1st By some other will or codicil in
 writing or other writing declaring the same a
 2nd By burning tearing cancelling or obli-
 ving the same by the testator himself or in
 his presence & by his direction & consent.

or 3rd unless the first devise be altered by some
 other will or codicil in writing or other
 writing, signed in the presence of three witnesses
^{At the direction} declaring the same.

Here I ought to remark the difference
 between this clause & the clause in the devising
 clause of the St. In the latter the words are that
 the witnesses shall sign in the presence of the
 testator. in this the testator must sign in the
 presence of the witnesses.

Revocations (158)

It has been held that this st extends not only Devises to devises of land but also to legacies + sums of money & things changed on land.

Coth 81

Pr 160

This st does not affect implied revocations for 1 Bl. 2340
it leaves all implied revocations as they stand at Coth 81
com: law. — In 5 JR 494c. It is said that if this stat 73. 503.
were res integra the determination might be diff. 1 Vesey 157
So also it does not affect revocations by a subscript
alteration or an attempted alteration they are
indeed implied revocations

This st then introduces a new rule only as
to express revocations. and if there were any
doubt on this subject it may be cleared by the
word in the statute "declaring the same"

P¹ Clause no devise shall be revoked otherwise
by some other will or codicil or other writing declaring
the same — In this part the st seems to be only declar
atory of what the law before was except that the
word, will or codicil in the first branch are
construed to mean a will or codicil made
as the st of devises requiring a will or codicil
to be made viz that the devise or codicil to
revoke sh^d be attested by three witnesses signing
in the presence of the testator.

1159/ Revocations
Devises.

But the instrument contemplated in the 3^d clause of the revoking part is construed to be an instrument not required by the devising clause in the st of frauds. for this clause properly requires something diff from what is required in the devising clause. viz that it shall be signed by the testator in the presence of the testator witnesses instead of being signed by the witnesses in the presence of the testator.

1 Vesey 17

ante 97. 151

A devise to the testator here at law if executed according to the revoking clause the void in itself is a revocation of a former devise. This is an exception to the next rule because it does not come within the reason of the rule. For the heir can take this he must take by descent.

The reason is that the testator intended to take from the first only what he gives to the second

But a subject disposing & revoking instrument need not comply with the first & last branch of the revoking clause. if such an instrument complies with the first branch of the revoking clause it will be effectual to revoke within this first branch. and effectual

Pond 632: 39

30 Mod 258

Carth 79

1 P Wm 593

Rec in d 479

as a devise being executed according to the devising clause for the first branch of the revoking clause & the devising clause are construed to be the same. But such instrument will not be effectual to revoke unless it complies with the 1st clause

Pond 647: 8

An instrument intended merely to revoke, will be good if executed either according to the first or third clause, the express words of the st make it effectual in either case - 10 P Wm 645

Rec in Ch 460. 10 Mod 467. Pond 631.

1 Eq. ca 409

2^d clause: tearing burning obliterating & Destroying then are not affected by the 1st but stand precisely as they did at com. law.

Revocations effected in this manner are implied Comp 52
 revocations & therefore these acts tho' done by 1 PM 1346
 the testator are not per se revocations but they
 merely furnish evidence of a revoking intent & 3 M. 6, 508.
 any such acts are revocations or not as they 4 Burr 2578.
 are or are not done animo revocandi.

Thus when a testator cancelled a will
 by mistake,

It is not necessary however to revocations 2 C. 1043.
 of this kind that the instrument be totally 1 PM 635.6
 destroyed or annihilated the slightest
 tearing or obliteration if done by the
 testator with the intention of destroying
 & revoking it is suff.

And when there are duplicates of a will 6 M. 453
 if the testator destroys one of them animo 1 PM 346
 revocandi it is suff. to destroy both for they 2 Vern 742
 are both but one instrument. Rec in 6 L 460
 Comp 49

(163)

Revocation

Devises

Revocations of this sort as they depend
1 Eq.ca 409 on the intention of the testator may arise
10 Mm 343 only to conditional revocations. Thus when
2 Eq.ca 776 a testator supposing that a new will was
4 Burr 2575 completed began to destroy the first but
6 Mm 451 being informed that the latter was not
Pul. 638. complete desisted & said he was sorry that
he had obliterated the first. he died
before the second was completed & it was
held that the former was not revoked.

Here parole evidence was admitted merely
to explain a presumption arising from an
extrinsic act.

Conf 612

And a will obliterated in part by the
testator may still be good as to the residue
as where a testator devised all his estate
to A except blackacre & obliterated the exception
the devise was adjudged good.

Real Property 1825.

Devise.

From what I have said concerning the diff
between the 1st & 3^d branch of the revoking clause
there arises a distinction between an instrument
of revocation only and an instrument intended
both to revoke a former devise & to make a
new disposition of the same property.

Revocations

Now as to an instrument of revocation only. An 578.
1711/14/150.5
Rev in 1800
10 m 1807
it will be good if it complies with either the
first or the last branch of the revoking
clause. for the 1st expressly makes a devise
revocable by either of these diff ways.

But on the other hand it is a good rule that 3 Mod 255
if the subject instrument is intended both as a early 79
1711/14/343
Rev in 1804
21 m 741
20th 272
disposing & revoking instrument it will not
revoke the former instrument unless it conforms
to the first ^{branch} of the revoking clause
is the same in construction as the devising
clause. The reason is that when the instrument
is intended both to revoke & dispose the
intention of the testator is supposed to be
to take only from the devise in the former
instrument what he gives by the latter
instrument to the latter devise—

Revocations,Devises

The result then of this distinction is this —

If a deviser intends in the second instrument to revoke & nothing more, he may make it effectual for that purpose either by complying with the 1st or 3^d branch of the revoking clause.

But if his object is both to revoke & dispose in the latter instrument he cannot, make the instrument effectual to either of these purposes without complying with the 1st branch of the revoking clause.

The Court then is no so on the subject of revocations. Probably the common law rules would apply as to revocations.

And it appears proper for our Ct to adopt with respect to devises the maxim *eo ligamur quo ligatur solvatur* — We now have a Stat similar to the English — Stat 29.

Republication

A devin tho revoked if not destroyed by Devise
may be revived by republication. for being in force
in but at any it may as well be confirmed
by a subject act as revoked by a subject act.
The revocation may itself be revoked & then the

(168) And before it of fraud or fraud declarations
are suff^t for the purpose of republication. & Roll 118
at com^l law the slightest words might be construed into a republication. & slight acts had the same effect. — any thing which amounted to an acknowledgment of the will as an existing valid will was a republication,

When a man said that he after purchase (see 119)
land & so go when his other land went. this was held 21 Hen 209
a republication of a will which contained the expression
"all my lands" And when a man had made his will & 21 Hen 209
said my will is in a box in my chamber this was
not considered as a republication

Any act subject to a devin made showing an intent that the devin sh^d remain in force was construed into a republication —

If a man having devised his estate made a subject judgment to the use of his will & Roll 117
held that the judgment was both a revocation & a republication of the will.

(170)

Republication at C.L.Devise

(24)

But the subject appointment of a new executor or the giving of a legacy or both did not amount to a republication of a devise for these acts relate to the personality only.

3 Atk 130

Don. 584

657. 673.

660.

3 PM 165.

2 Vin 209.

60 E 493.

1 Will 618.

1 Eq: ca 416

1 Ves 415

2 M 441.

And it was held that the mere annexation of a codicil taking no notice of an original devise was a republication even tho' the codicil relates to the personality only. The codicil is a recognition of the will as an existing will. This opinion is however contradicted & it is held that if the codicil annexed to a prior devise relates only to personal property that this codicil does not republish the prior devise. but the former opinion appears to be better supported. than the latter.

6 May 358

9 Mar 86.

1 Ves 443.

3 PM 129

Comp. 158.

Don 658. 66

1 Ves 488

442.

Don 582. 418

of codicil whether annexed or not if it expressly republishes the former devise it will be a legal republication or if it clearly relates to the subject matter of the will. providing that the devise contemplated that as his will at the time of making the codicil. And it seems that any words in a codicil showing an intent to confirm a prior devise will republish the devise. Then are rules of the C.L. & suppose a codicil to not executed according to the Stat. of f. and s.

But since the St of fraud the question of devise republication stands on diff ground & the it is observable that nothing is said either in 1 Vern 84 the English St or our own on the subject of 606 84 republication. But as a republication is 606 84 precisely the same as making a new devise 850.2. 656 it is held that the republication must 1 Ves 448 be executed precisely like a devise viz be 9. mod 75. signed by the testator & attested in his presence &c &c

Parol publications are therefore now at an end both in Eng^d & here

Mr Pon^t says that no codicil can ant^e to a republication unless it is signed by the testator in the presence of three witnesses. Now if he means that the republication must be in the presence of three witnesses he is correct. but there is no authority that the signing of the testator sh^d be in the presence of the testator. the authorities indeed say that the signing was in the presence of the testator but the republication w^{as} undoubtedly have been good had the witnesses signed in the testator's presence tho' the testator had not signed in the presence of the witnesses.

We have in this State no St on republication but our Ct have determined that a parol republication was not suff^t & on the same grounds that it has been so determined in Eng^d viz that as republication is in effect making a new devise that it ought to be executed as the St of fraud requires the devise itself to be executed.

586.7.593. In the devising clause of the st of frauds act not extend to implied republications but only to express republications. Thus if a subseqt devise implicitly revoking a prior devise is itself revoked the prior devise if remaining stands. W Pon. says that the prior devise is republished but it is not republished so as to carry after purchased lands &c, 'Stearnes Real actings'

120489 Under the st no express words of republication
Pon. 663.4 are necessary. Thus if a testator makes a codicil
168. and says 'I desire that this codicil may be a further part of my will' this amounts to a republication for it acknowledges the existence of his will at the time of the codicil made

Ver. 485. And it seems that any codicil tho' not actually
7.2.140444 annexed & disposing only of personal property amounts
30M.116. to an implied revocation if executed according to
110p.416. the devising clause. for this attestation by 3 witnesses is
7.6.98. wholly unnecessary for the purpose of disposing of personal
2.10.1621. property & therefore the intention is clear that the
1.10.489. testator intended the codicil as a republication of
Am. 571. the will. (vide ante)

Pon. 679.681

Comp. 350.158 The precise effect of a republication is virtually
1.7.1893.204. to give the devise a new date so that after republication the devise will comprehend all such property
4.5.160. & all such persons as it w^d have comprehended had the devise been made at the time of republication
2.4.31.823. hence if J^d makes a devise to day tomorrow purchases
1.11.100. new lands & day after tomorrow republishes this devise
S. Mod. 225. the lands subseqt purchased will hap if the words
Willes 297. of the devise are suff^{ly} comprehensive. for it is
Fall. 444. a good rule that wills are to be construed according
1.10.581. to the state of things and the testator's intention at the time of making & republication is a new making

And hence if one devises all his lands & afterwards purchases other lands & republishes the devise will carry the after purchased lands. & the same if the devise were of all the lands wh'd own in A & then testate afterwards purchases other lands in A & then republishes &c.

60 Eng
Gony 281
Pow 674
Jell 278.
122 H42
722 H92
172 204.

On the same principle if one devises to his son A who dies & afterwards has another son to whom he gives the name of A. & then republishes the second son of the name of A will take. but if the devise had not been republished the second son A could not have taken.

122 H42
3 Kel 347
560 88
Pow 175.
172 173.

But the republication of a devise can extend no further than to give the words of the devise the same operation that they would have had if they had been written at the time of republication.

(H)
Pow 676:34

Thus a devise of blackacre, then purchases B. & then republishes, the farm C. can not pass.

Hence also words used in the original devise as words of limitation cannot by a repub. be made to operate as words of purchase. hence if one devises to A & ^{his} heirs of his body & if A dies before the testator & after A's death the devise is republished the heirs of the body of A cannot take under the devise thus republished for if the devise had been originally made at the time of the repub. to A & the heirs of his body the devise w^d have been void as being to a dead man.

Flow 347.
HJR 601
Rec in 62 H29
Ray 2408.
Dow 337
122 H42
122 H42
222 313
315.

(175)

If a devise real estate to his son & gives a leg.
3 Mod 311. to his grandson of the same name. after the
1 Vent 340 death of the son the testator republishes his devise
2 Arg 466. the grandson cannot take, tho a grandson will
2 Lev 248. sometimes take under the denomination of son yet here
the testator by giving the legacy to his grandson has
shown that he intended to use the word son in its
proper sense.

2c in 647. A codicil cannot give to a devise any inherent
2 Wm 571 validity wht it did not before pass. the effect of
Cutt 55. a codicil in republishing a devise is to set up the
Com 6174. original devise in the same plight in wht it stood
3 Mod 262 at its inception. If therefore an original devise
1 Wm 557. is not executed according to the Stat. the codicil
tho properly executed cannot make the original
devise good. for a codicil is relative & only
affects one original complete instrument.
12 Ann 549. This rule however is diff. when an entire original
7th 102. devise is executed at diff. times. if the latter is
duly executed the whole devise is good.

2 Atty 570. And Hardwicke held that if a person devises
10m 553-5. his devise all the lease wht he then hold & after
wards republishes the will after having renewed a
lease. that the renewed lease is not pass. sed
quare.

1 Atty 579. A devise may be republished by mere recogni-
1 Sid 162 tion & such a republication may supply a want
10m 556. of capacity wht existed at the time of the first
execution, as well as a want of subject matter
whereon the devise might operate.

A republication consists in the testator signing
his name anew. & a new attestation of witnesses.

(100) Jurisdiction

Devises Non this rule is precisely the reverse of the rule of
2 PM 270 a deed for every fraud in a deed except in the eyes
Con 692 law is to be true in Equity

The reason of the distinction is that a devise
obtained by any sort of fraud is void. but a deed
obtained by fraud is still a deed unless the fraud
is in the execution. i.e. it is still a deed at law.

2 CC 524 Again whether the testator is compos mentis is
PM 211 a question to be tried at law. being a question
of fact for a jury. & this is
PM 288.

4.6.109. But this Eq. can not set aside a devise for fraud
PM 667 yet equity can take from a devise the benefit of
PM 288. a devise fraudulently procured on a trust. or in
2 PM 697 any way procured on a trust. but this is giving
effect to the devise. for thus treat the devise as a
devise but as devise in trust for another.
Equity in this proceeding acts in virtue of its juris-
diction over trusts.

Ex gr. A agreed with B the testator to give
B £1000. provided B would devise to A certain land A
paid B £1000. but the notes were forged. B devised the
land to A. & the C. decreed that A sh. get claim
to the land at law of B.

See in 667 In a similar principle if one being abt to provide
PM 197.8. by devise for younger children & is dissuaded by the h.
promising to make the same provision a B of Equity
considers the h. as trustee to the younger children

No evidence was here admitted to relieve
of fraud.

In such contested cases, much on the words of the devise are to be determined at law

But where there are conittable circumstances 30 PM 2/10
requiring the interpretation of the Ct of Chancery that Pon.⁶⁹⁹
it will construe the will as but unimportant circumstances
exists that Ct has no original jurisdiction over the
construction.

The best proof of a devise is the original instrt Pon.⁷⁰¹
itself & the best evidence is regularly required in all 2 Kel 357/1
cases & therefore where one claiming under a devise instead 1 Kel 117
of producing the original instrument & proving it produces Rom 6395.
a bill in chancery by the heir acknowledging & stating
the devise, it was held that the bill was not suff evidence.

And the exemplification of the devise under Com 646
the great seal is not evidence in an action of eject Pon.⁷⁰²
by the devisee agt the heir. i.e. it is not regularly good
evidence. Exemplification is an heir a copy.

The probate of a will in ecclesiastical Cts is Com 6246
no evidence in a Ct of justice as regards real prop Pon.⁷⁰³

And even if the will is lost such probate Pon.⁷⁰³
is not evidence as regards the real property. Lil Reg 324/4
the copy of it from the ecc. Ct & sworn to may
be evidence, but the probate is not.

Mr Pon? indeed says that when the will is lost the Pon.^{706.7}
probate accompanied with other circumstances, may
be suff evidence per quere.

Devise But when neither party to a suit has a right to the possession of the devise a copy is sufficient evidence ex necessitate rei. On this principle Capt. Medley's will was proved by copy. Fairfield County.

Pon 705.

1 Feb 117

Lib. & 74.

Pon 707.

And it seems too that if a devise remains in Chancery by order of Court, a copy will be admitted as evidence. But this rule has no application in this state. ~~And~~ however is the constant practice in the Ct. of this state to receive a copy in evidence when the devise is retained in a Ct of probate unless the execution is denied.

Pon 708.

If proof of the attestation is required it must be proved by one or more of the subscribing witnesses ~~are~~ living. But if they are dead the hand writing of the witnesses must be proved by the original devise.

1 May 741

2 Stra 1254

Pon 708.

710. 70.

In a trial at law however one of the subscribed witnesses is sufficient if he testifies all that the law requires to be proved. But he must be able to testify that the testator signed, that all the witnesses subscribed in the presence of the testator.

But the meaning of this rule is that the testimony of one is sufficient to let in the will to be read to the jury, but the jury may believe or not believe this witness as circumstances require.

Holt 742

Skim 413.

Pon 709.

2 Stra 1254

Pon 709.

Pon 714.

And when all the witnesses are present in Ct it is not necessary in law that all should testify to the signing, and of the testator. They must all subscribe indeed but they need not all testify to every necessary fact. And indeed if all shall testify ag. the ex^t the will may still be established by other witnesses.

It is clear then that the testimony of subscribing witnesses is not conclusive either for or against the devise. Buller 284

Strait 106

Poult 711

1 Bl R 365

There prevails in Engl? a practice of proving devises in Chancery. It is therefore frequent in Engl? to obtain a probate of the will in a Ct of Chancery, as a will of personal prop^y is proved in the ecclesiastical Cts.

This probate is conclusive upon all persons whatsoever & it precludes the possibility of disputing the execution 1 Will 216 of the devise in any Ct whatsoever, what interest, Poult 718. the devise takes, whether the devise is void as being contrary to law &c & indeed every thing arising from the face of instrument may be contested in law.

This proceeding is wholly unknown to this state. Chancery has nothing to do with the proof of a will here. Here Cts of probate prove wills & an appeal lies to a sup^r Ct.

But in Engl? Chancery will never grant probate 2 Atk 120 of a devise unless the heir is forthcoming. Poult 714

A Ct of law can try the devise in an action between A & B, whenever the heir may be, but this trial of the devise is not conclusive.

This formal probate by a Ct of Chancery is never necessary. the devisee may bring ejectment 3 P M 192 against the heir & prove the execution &c of the will Poult 715. & recover. but this proof of a will is conclusive only between the parties themselves & their representatives quoad that particular subject matter in dispute.

2 Att 27 If a bill is brought in equity to grant probate
 Pon 718. of a will & the heir being in the country & not
 appearing probate is not granted pro confesso but the
 devise must still be regularly proved.

1 Mis 216. As to the probate of a will in Chancery is this conclusion
 1 Ves 277 it is an invariable practice in that & never to
 Pon 718. grant probate of a devise unless all the subscribers
 witnesses are present.

This rule however presupposes & trusts that
 all the witnesses are alive. This indeed is a fair
 inference from the reason of the next rule. vide Pon 719.

2 Ves 459 And tho' one of the subscribing witnesses are
 1 Att 627 be' seas yet his testimony must be had or the
 Pon 719. Ct will not grant probate. for the Ct presumes
 it not impossible to obtain his testimony.

The practice of our Ct of probate to decree
 a devise pro modo on the testimony of one of the
 subscribing witnesses. if that testimony is satis-
 factory.

1 Stra 961. And it is provided in this state by Stat. that
 1 Ark 627 the subscribing witnesses may give in their
 20 Ark 627 testimony by deposition taken before a justice
 of the peace. And if one of the witnesses resides
 abroad a commission issues from the Courts here
 to the courts there to take the deposition of the
 witnesses but in such case the devise must travel
 into the country where the witnesses—

(136)

Waste (11)

Waste is any destruction or spoil committed upon land, buildings, trees or other corporeal hereditaments sett 53 to the disseisin of him who has the remainder B 281. 223. or reversion, in fee simple or fee tail. 5 Bac 455.

The law takes no notice of waste except when committed by a particular tenant. the same acts if committed by a stranger amt. to trespass and are not called waste, a distinction was formerly taken between waste & destruction but this distinction is now abolished.

Waste is either voluntary or permissive.

Voluntary waste is a misfeasance & implies Co Att 33 a positive tort, a wrong of commission 2 Bl 351

Permissive is a non-feasance is a wrong 5 Bac 457 of omission. Waste 53

A covenant by lease not to do waste is broken by 281 by permissive waste as well as by voluntary waste 5 Bac 447. Hence if the lease covenants that if he does waste Waste B. the lease may reenter if the lease permits houses to decay or the uper may reenter. It has been held in one case.

The rule w? undoubtedly be the same if the covenant was not to commit waste.

2L281

5 Bac 457
Waste, C.
4 Co 35.

Whatever occasions a lasting injury to the inheritance is waste when committed by a lease or particular tenant - And indeed a stranger cannot commit waste he may commit the same act wh^{ch} is in particular tenant ant to waste but in a stranger it is trespass & not waste.

Waste in buildings.

Co Litt 53a

Comyn Dig

Waste d.2

3 2L281.

4 Co 64.

bro & 329.

374.

Bac Waste 5.

The demolition or burning of a house is waste. removing from a building any thing annexed to it as doors &c is waste. removal of any thing wh^{ch} may be called a fixture is waste.

Co Litt 53a

4 Co 64.

5 Bac 463.

Waste 5.

And a removal by the leasee of things annexed to the freehold by himself is waste if this thing removed is a fixture. - the leasee has made them the property of the leasee by affixing them to the freehold. Modern cases have relaxed this rule,

In genl nothing is waste except that wh^{ch} ^{Waste in} Buildings occasions a permanent injury to the inheritance bro J132 but if lessee be changes the structure & the Per 309 use of a building it is waste unless done by 311. permission of the reversioner & even tho the building sh^d be made better by the changes 1. Mod 94. 2. Bl 282. Comyn Dig Waste 62. d. 2.

One reason given is that such change impairs the lessor's evidence of title - & besides, the lessee cannot have the right to make such changes, the lessee is presumed to wish to have the buildings remain as before,

If a lessee suffers a house to decay for want of necessary repairs is waste unless the lessor undertakes to repair the buildings or unless he is expressly exempted. And the lessee is liable waste c5 } in this case even tho there is no timber on the premises. for it is his own folly to take a lease of land on wh^{ch} there is no timber. Co. Litt 53a. 2 Roll 815. 5 Bac 461.

But if the lessee himself has cut all the timber after the demise the lessee is not liable for not repairing. Comyn d. Waste d. 2. 2 Roll 822. 5 Bac 465. Martin d.

41
Waste in
Building

406234 The erection of a new building on the land
demised by the lease is not per se waste. but
5 Bac 466 if he takes the timber of the demised land for
1 Cruise 1051 ^{maxwell} building the house or for repairing it is waste
2 Rol 815. ~~Can~~ or made. N.D.
(Co Litt 53a) contrary

406234 But if lessee having erected such a building
Co Litt 53a suffers it to decay he is guilty of waste for
Comyns Dig he has made it part of the freehold.
Waste d2

406234 If the lessee erects a new building on the
land leased the lessee is ^{not} liable if he suffers
it to decay for it is not parcel of the
demise. The lessee cannot by his own act
impose a new building on the lessee.

Of land is leased with a building upon it ^{Waste in Buildings}
 & the building is uncovered at the time of Co Litt 53a
 the lease made the lessee is not bound to Comyn Dig
 prevent the decay by covering it. for he is Waste d 2
 not bound to put the house in better condition 5 Bac H 61.
 than it was at the time of the demise which
 he must do if he covers it.

At com: law the burning of a house by ^{Waste in Buildings}
 accident was waste in the lease but now 5 Bac H 62.
 by 6 Ann. he is excused for an accidental Waste c 5.
 burning if the lessee is in no fault. We
 have no such Act but our Co w^d probably adopt
 the reason of the English Act.

And the lessee is never liable for any ^{Comyn Dig}
 injury which is inevitable as by the act of Waste c 5.
 God. of public enemies, or by the act of Co Litt 53
 the lessee himself. This is neither voluntary Bac a b
 nor permissum — post 16^o 464. 474.
 2. Bac 281.

(1) Waste in
Land.

But if a house thus injured is left standing
1. Co. B. 7. b. and is capable of repair the lessee must
repair it in reasonable time or he is
Waste 25. guilty of permissive waste as if the house is struck
Co. Litt. 53a with lightning & partly consumed
5. Bac. 414.

We suppose the lessee in such case covenants to
repair with an express exception of casualties by
fire. Would he then be bound to repair?

(2)

If a tenant commits or suffers waste but
repairs the building before action brought
the action cannot be maintained but
in this case, in case of committing a
permitting waste the lessee may not take
timber from the land for the purpose of repairing.
for he has the right to take timber & repair for the
purpose of preventing waste but not for repairing
injuries already committed or permitted. In
here the repairs in whole or in part are
~~the~~ necessary by default of lessee -
land.

Comyn Dig

Waste 24

2 Roll 416.

Co. Litt 53. b

5. Bac 414.

Comyn Dig

Waste 25

Digging & carrying away soil is waste. taking
away a dam or wall whh was intended to
protect the land from overflowing & the
land is overflowed in consequence the tenant
is guilty of waste. same of permitting the
wall to decay. And if the wall is carried
away by tempest the lessee must repair it
in reasonable time or he will be liable for any
injury whh arises from its decay. -

Bad husbandry is not of course waste tho' it may amount to waste for in genl it is an injury to the lease & not to the remainder man - But the conversion of one species of land into another is waste as if arable is changed into meadow or pasture & converso. this is called waste because it changes the course of husbandry & besides in Eng^l it changes the identity of the land. This rule probably does not hold in this state or in this country. Any change however whl wd be a permanent injury to the inheritance, must be waste here

2 Roll 811H

5 Bac 458.

2 Bl 282

406 234

Co Litt 53.6

Comyn Dig

Waste d. 4.

If tenant opens a new mine upon the land he is guilty of waste unless the mines were expressly demised for he is presumed to take the land for husbandry. but if he leases land on whl a mine is opened the lease of course may work the mine unless expressly restrained by the lease for when a mine is open it is presumed to be a part of the consideration whl induces the lease to take the land.

5 Co 121

Colled 190.

Comyn Dig

53 l. 1st d. 4.

406 234.

Co Litt 53 (6).

Trees.

If tenant cuts down timber trees except for the inheritance. and if he does any act in consequence of whl the timber decays he is guilty waste as if he tops them so as to make them decay or if he is guilty of neglect by whl the timber is suffered to decay he is guilty of permissive waste. as if he suffers the fences to be out of repair so that cattle injure the trees &c

2 Bl 281

4 Co 62

Co Litt 53 n. 6.

Comyn Dig

Waste l. 5.

4 Co 62

9)
Waste in
Trees.

2 Bl 281. in building.

1 Roll 649

5 Bac 409

46 219 But trees not timber may be the subject of
Co Litt 253a waste as ornamental trees or trees used for
Co Litt 55a shade then Id Coke calls destruction These
Comyn Dig are important parts of the inheritance
waste d5.

I. G. trusts that there is a material difference
between law with respect to cutting timber in
Engl? & the law here. especially in wild lands
& in the case of doners & courtesy. indeed it
was once decided in Court that in such a case
the widow might cut timber. It is a great
object in Engl. to preserve the timber but
in Court & in genl in the US it is not
so.

As to what particular kinds of trees are to be consid
2 Bl 281 red as timber Oak ash & elm of the age of 20 are
6 Co 251 timber throughout the realm but usage makes
Co Litt 53 other trees timber — But in our country what
Comyn Dig trees are to be regarded as timber must depend
Mast d5. upon usage & the trees which the country produces.

Oak pine chestnut cedar locust &c are in
Court timber. so perhaps hemlock

Underwood does not come within the denom-
ination of timber & thus it is said the tenant
may cut at his pleasure if he does it at a
proper season. (unless restrain'd by the terms of c.)
He may he cut it for the purpose of selling it?
2 R 212
1 R 146
2 R 457
817.

2 R 35 & 232—

The tenant for life or years is entitled of common
right to such wood growing on the land as is
necessary for fuel, repairing houses fences &c. &
these are called Stoveys. — Is for making a for
repairing instruments of husbandry.
2 R 35.
2 R 212
Co Litt 57.
Bro & 604.
Co Litt 44.
Bac Waste 2.

But after tenant has suffered a building to become
ruinous for want of repairs he cannot afterwards
take timber off from the estate devised to repair
this building. (vide ante) for he has already
been guilty of waste & may not take lepro's
timber to repair his own wrong.
Co Litt 534.
5 Bac 466.
Waste 17

Erection of a new building by lepro is not
of itself waste but if he takes lepro's timber
for that purpose he is liable for waste. unless
or if he takes lepro's timber to repair it. (ante).
or if he makes a fence where there was
none before with lepro's timber.
Comyn 2
Waste 15
Co Litt 53.6

(11)
Waste in

Trecy.

Th

If tenant cuts timber for repairs whh are not necessary or whh are necessary thro' his neglect he is guilty of waste. (ante)

Th.

If tenant cuts timber & sells it that he may apply the proceeds to making repairs he is guilty of waste. The law requires him to apply the timber to the repairs otherwise the ten't might speculate.

Comyn Dig. Where the lease covenants to make all necessary repairs Wastedo. at his own charges he is still entitled to timber from the estate. for the right of cutting timber to make repairs is so closely incident to his estate that it cannot be taken away except by express words.

Godolphin

Comyn Dig.

Mast. & S.

And the tenant may in many cases cut timber for repairs tho' he is not obliged ^{to make} these repairs, thus if lease covenants that he will make repairs the lease is still at liberty to cut timber & make the repairs himself if it becomes necessary. For the policy of the law favours the repair of buildings,

And where the words are 'witht impeachment
for waste' still tho' not bound to repair he sh^d
may take timber from the land & repair. 2 Roll 522.3.

So if a building was ruinous
the tenant tho' not obliged to repair may
take the timber of the estate & make the
repair

The destruction of fruit trees in the garden or Co Litt 53a
orchard is waste but not so if the fruit trees Comyn Dig
is not in a garden or orchard. as in the woods Waste d. 3.3
or in the open fields. 2 Roll 87

Miscellaneous wastes.

The destruction of a common fence is not per se 5 Bach 61
waste but in its consequences, it may be waste Waste c. 4.
as if tenant destroys a fence & in consequence
cattle sh^d injure trees. So the breaking down
of a stone wall is waste, per se. But
the breaking down of a common wood fence
is s^d not to be a permanent injury.

But destruction of a park fence is waste. so
suffering it to decay. Comyn Dig
W. d. 3.
Co Litt 53.
2 Roll 222

But any thing wh^{ch} might amount to waste is
not waste unless it am^ts to 40 pence !!!
de minimis &c

1044
Comyn Dig
Waste c. 1
Co Litt 54.
2 Roll 874
2 Roll 228.

Waste in general

no person can be guilty of waste where the
 bro & bgo land on wh^{ch} the injury is done is not part of
 Comyn Dig the demise. Presap is here the only remedy.
 Waste & 2. for the action waste arises out of the privity of
 estate between lesor & lessee &c.

Comyn Dig Where a lease is made with impeachment of
 Waste & 3. waste the tenant is not liable for any waste
 bro & 216. however extravagant. but in such case a C of
 2 Bl 283. equity will interfere and prevent wanton waste
 by injunction.

Comyn Dig But this exemption from liability to waste
 Waste & 3. can only be created by deed & to constitute a
 1 Roll 183. bar to the action of waste the clause must
 be in the deed. for if in a separate deed
 the lesor covenants not to sue the lessee for
 waste he may sue & recover & the lessee may
 have his remedy by a suit on the covenant
 vide covenant broken

Comyn Dig If tenant in tail makes a lease with impeach
 Waste & 3. for waste the clause does not bind the issue
 1 Roll 180 in tail even tho' the issue in tail sh^d confirm
 the lease by accepting rent. & even by
 accepting rent after waste committed. for
 the next issue have ^{now} an interest.

Who can maintain this action

The lessee is not liable for any waste occasioned either directly or indirectly by the lessee as if Conyn D lessee cuts all the timber & the lessee suffers building waste & to decay. he is not guilty of waste. (ante) 2 Roll 822
So if lessee destroys a fence & by this his trees are injured,

So where the injury is occasioned by the act of God or of public enemies. (ante)

10 Co 139
Conyn D
Waste 25.
Co Litt 53a

Who may maintain this action

By the ancient common law there was a writ issuing from a Ct of law to restrain waste but this writ is now taken away by Statute.

13 Ed 105.
121.

The action must be brought by him who has the immediate reversion or remainder in fee simple or for tail. i.e. there must be no intervening freehold between the estate of the tenant in possession & the Plf in this action. Conyn D Hence to A for life remainder to B for life rent to C in fee. C cannot maintain this action for waste ag^t A. if B. is alive. in such case the remainder man has no remedy except in Chancery. sed in a? not a simple actⁿ on the case for damages lie,

Co Litt 53b
285
3 Bl 287
Hutt 110
Conyn D
Waste 25.
5 Co 77
Co Litt 53a
2 Bl 167.
1 John 58.

Who can maintain this action - Waste,

2. Bl 166 If the intervening estate is only for years
Common Dig term for years does not need to be supported
Waste c3. by the freehold before it.

Same if the first estate was for term
of years. And in case of the intervening
estate being term for years the lease of the term
will enjoy the estate notwithstanding the forfeiture
by the first tenant & the entry &c by the remainder
man in fee.

Common Dig
Waste c2
Allen 821

If an intermediate estate for life is limited
on a condition precedent & the first tenant
commits waste before the intermediate estate
has vested in interest, the reversioner may
sue the first tenant for waste, but if the
estate was already vested this could not
be done for tho' the law will allow a contingent
interest to be defeated yet not a vested one.

60 Litteria And it is sufficient to this pt that the Def has
56076 the immediate estate of inheritance at the
Common Dig time of action brought tho' he did not have
Waste c2 it at the time of the waste committed.

For it cannot now be objected that any one will
be injured by the remainder man's recovery,

- If the action lies before it is tant ^{as to} another
in value of the Waste of West 2^d, vide
It tenants. tenants in common &c.

Comyn & 49

Waste 22

3 Bl 227

2 Bl 113, 194

And at C & L if one tenant in common &c
leases to his companion & the latter commits
waste the former may maintain waste &
recover a moiety,

He who has the immediate inheritance may
join in this action with ^{one} him who has a smaller share
inst. thus limitation of a life remainder, & Comyn 50
B & to the heir of B. C may join with B this Waste 22
C has not any estate larger than a life estate. 2 Roll 225.
For if B could sue alone he w^d have a sole seizure
& thus defeat C's estate.

Excell 53(6)

42a

Comyn 50

Waste 22

2 Roll 225

- If lease for years & commits waste & his term
expires before action brought the lessor may
still maintain an action for damages but
he cannot recover the place wasted even tho'
the lease holds over in this case his remedy
is ejectment

Excell 283a

285a

5 Co 114

Crof 658

At common law the grantee of the reversion
 3. 20158 since a remainder man could not maintain
 6. 211215. this action for the condition not to
 6. 211215. commit waste is personal, and there is no
 privity of estate between the grantor of the reversion & the tenant.
 But now the grantee after having given
 notice to the particular tenant may maintain
 this action by 32 Hen 8th.

sed in is not waste a fact & is it not as much
 an injury to the grantee as before the transfer
 it was to the first reversioner - If the
 action was founded on contract then might
 be some reason -

Co L 54(a) * But in this case if the heir assigns his
 316(a) reversion the grantee of the heir may
 3 Co 23(b) maintain waste ag^t the assignee of the
 13ac Ab tenant in down,
 waste(h)
 Fitz 56

Waste (No 2).

Against whom the action lies.

At com. law only agt guardian in chivalry 2 Bl 282 3
tenant in dower + tenant by courtesy. 3 Bl 224
 1 B & P 121.

Comyn Dig

Maste c. 41.

Co Litt 541.

5 Co 131

2 Bl 283

Comyn Dig

Maste c. 41.

2 Bl 283

5 Bac 469

It does not then lie at common law agt tenant
for life or years created by deed of the parties

sed contradictor: 4 Co 120.

The reason was that the estate of the farmer
 was created by the law itself the law furnished
 this remedy. but as the estate of the latter
 was created by contract waste ought to have
 been provided for in the contract.

But by 52 Hen 3. + 6 Ed 1. the action is given
 agt all tenants for life or years. the action
 therefore lies agt devisee for life or years. and
 agt apigree of a lease for life or for years for
 waste done after apigreement.

3 East 35.

Comyn Dig

Maste c. 41.

5 Bac 469.

470. 3.

2 Roll 126.

Co Litt 54

Bro Eliz 683.

In qu't the action lies only agt such him
who committed the waste - or by whose fault &c
 the waste happened -

But it seems that if tenant by dower or courtesy
apigree + the apigreee commits waste the
 action lies agt the original tenants + not agt
 the apigreee. for they were liable at common
 law + at common law the apigreee were not
 liable therefore from necessity the original
 tenants were liable. + these Statutes made no alteration

Comyn Dig

Maste c. 71.

Co Litt 541.

5 Bac 472

Waste (h)

24/
Against whom waste lies?

Co Litt 511a But the action lies by construction of these
3 Roll 93. ancient statutes ag^t an occupant either
Common Dig. tenant for life & therefore within these Statutes
Waste c 4.

(86)

The action lies also ag^t an Ex^r or administrator
who take a term for years as ap^{ts} for waste
done by themselves. for they are ap^{ts}ees, but
not for waste done by their testator or intest
tate. This action will also lie ag^t an
Ex^r de son tort. — (vide post).

Common Dig. If lessee to commits waste & then assigns his
Waste c 4. interest the lessee may maintain this action
2 Roll 129 ag^t the lessee, & recover not only for damages
but for the term itself. because the right of
action was complete immediately after the waste
& he cannot by his own act divest a
right of action existing in another.

2 Roll 821 If a stranger commits what w^d be waste in
Common Dig. tenant for life to the lessee is liable for the
Waste c 4. waste & may indemnify himself by an action
Co Litt 511a of trespass ag^t the wrong doer. This holds also
5 Bnc 1474 as to tenant by courtesy & in dower on the
3 Lev 209 ground of negligence in not preventing it.
5 Bnc 1667 It is s^d in Bnc. that the lessee may maintain trespass on
Titly 60. the case ag^t the wrong doer. sed 2u — The rule is
founded on the supposition that the
lessee is remediable —

This rule holds as well agt a tenant who is an infant or feme covert. for this is a condition annexed to their estate by all conditions. infants are in genl bound.

Co Litt 542
Comyn Dig
Waste C4
5 Bac 474.

And the rule is the same if the stranger disposses the tenant & then commits waste. he is liable for the waste thus committed -

2 R. 10 21
(26)

A tenant for life &c having committed waste by the exor he cannot be sued in waste. actio personalis moritur cum persona. & this holds of tenant by courtesy &c. Indeed all torts as such die with the person,

'26'
Comyn Dig
Waste C5
2 R. 10 22.
Off of Exor
127.

This action does not lie agt a tenant in tail after possibility of issue extinct. for his estate is in its creation of inheritance. no condition is annexed by law. & he is not within these ancient statutes for he is not strictly tenant for life. but Ct of equity will restrain him from excessive waste. Tho' in this case he is not liable to an action,

Comyn Dig
Waste C5.
2 R. 25. 253.
Co Litt 27.
2 Roll 826.

(26)
Eg^t whom waste lies.

✓ The action does not lie ag^t tenant at will
c. 146. Blackstone says because the commission of
waste ipso facto determines the estate. but
Waste 25. confessedly he is not liable at common law nor
t. 601. 1. 1. by the Statute of Marlbridge & Gloucester which
602 777. him.
154. The remedy for the lessee at will is an action
of trespass.

But at this day what are usually called tenants
at will may be liable in waste. for it will
lie ag^t tenant from year to year.

(27)
Waste 25. The action will not lie ag^t tenant for life or
2. Roll 835. years "witht impeachment of waste" but a
Commons Dig. B. of Eg. will by injunction prevent such tenant
Waste 25. from committing executive waste.

Commons Dig. No does this action lie ag^t lessee of such a tenancy.
Waste 25. for the exemption is annexed to the estate &
not to the person - so it will not lie
ag^t the assignee & for the same reason,

The redress whh the common law & the
 st of Malbridge gives to the lessee is only
single damages, but by the st of ~~Malbridge~~
 Gloucester the tenant forfeits, treble damages
 and the place wasted.

2 BL 283

Comyn Dig

Waste f2

3 Bac 487

Wast 4m/1

These statutes are prima facie binding here.
 and yet in this state no claim has ~~been~~
 been made for more than single damages.

This action therefore is now a mixed action
 in whh land & damages are recovered tho' at 1
 it was a personal action,

3 BL 228

117:8

Only the particular parts of the subject in
 whh the waste committed is recoverable if
 the diff parts are easily separable. but if
 waste is committed sparsely over a whole
 farm the whole will be recovered. — a vague rule

2 BL 284

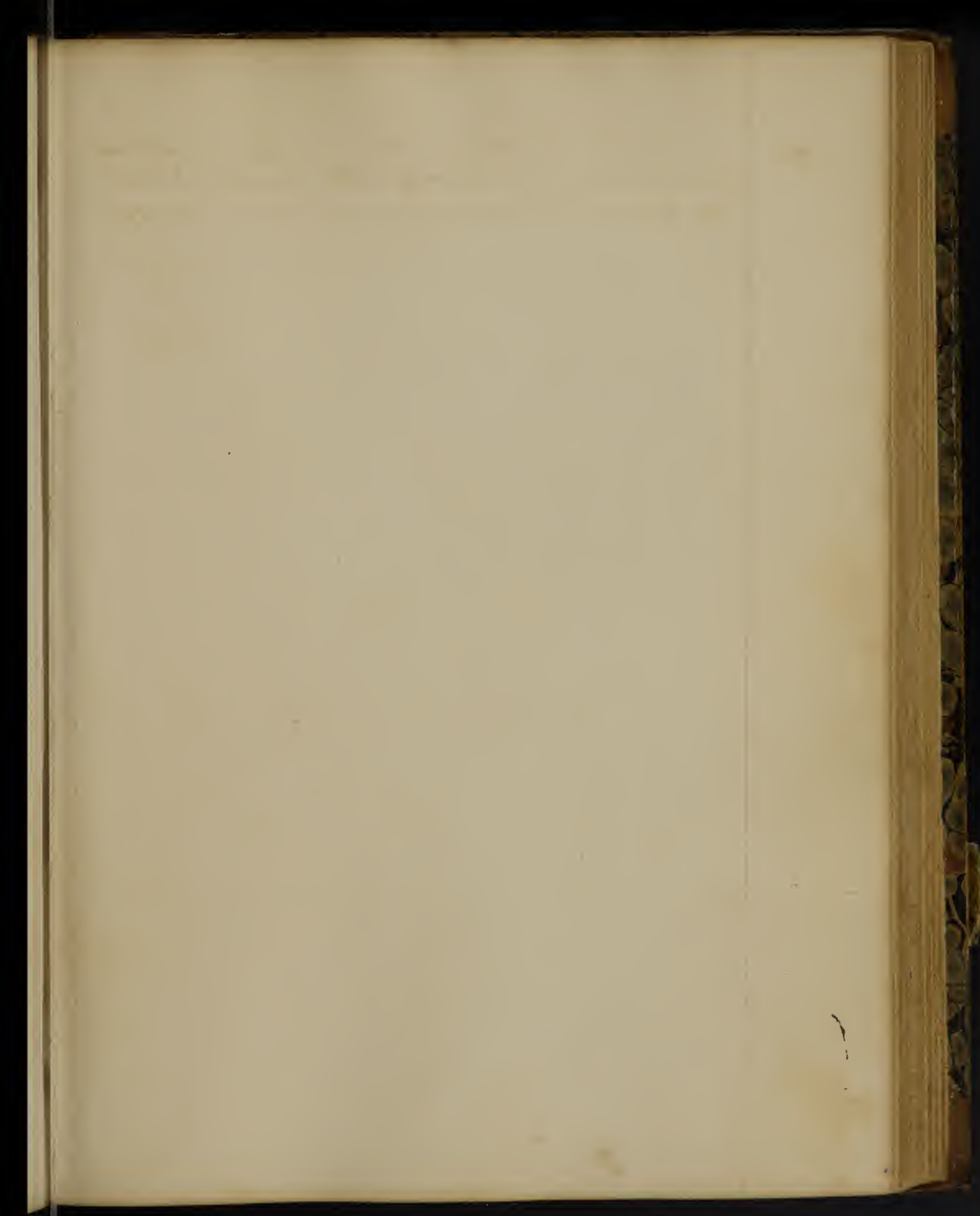
3 Bac 487

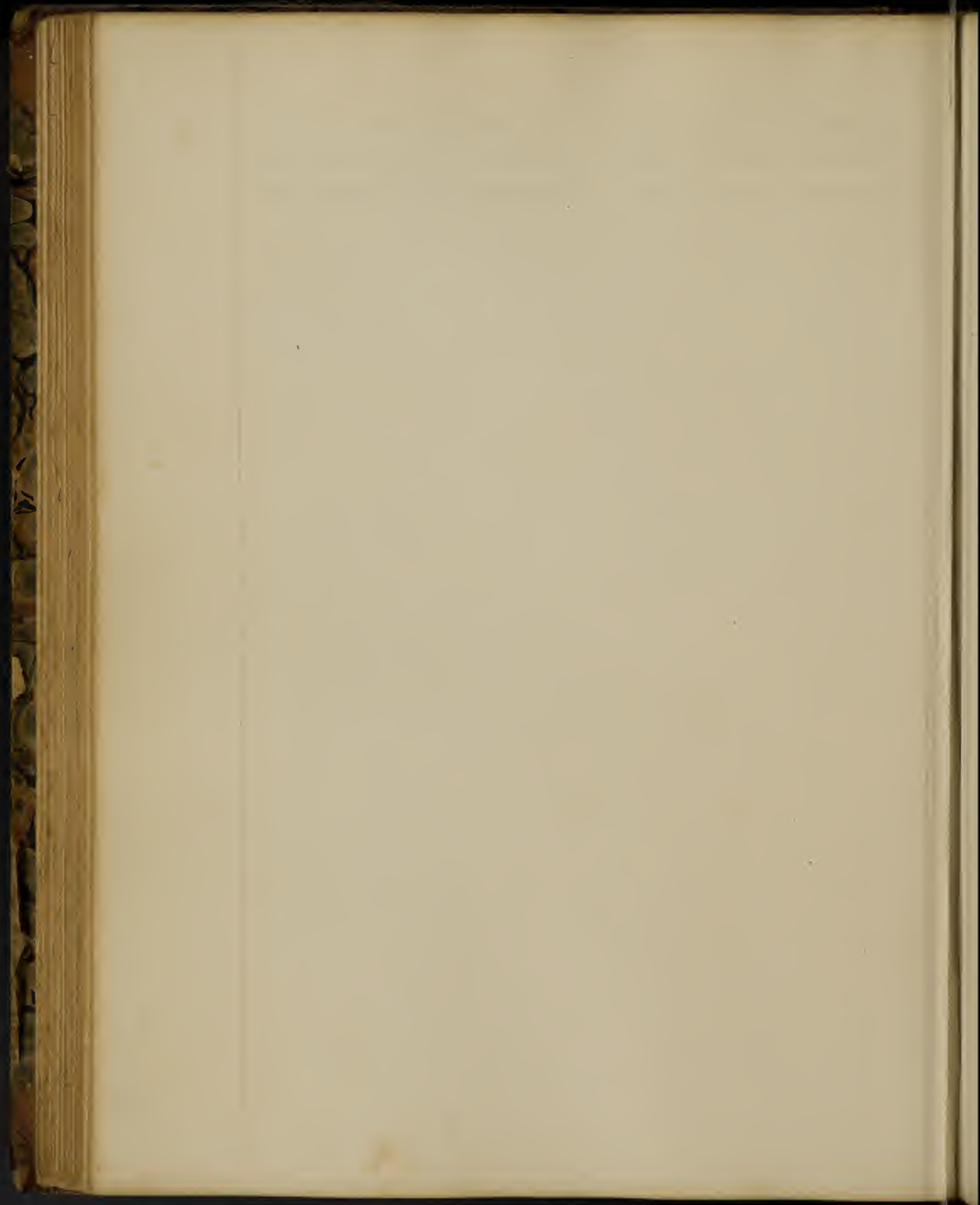
If waste is committed over a whole house
 the whole is recoverable but it is said that
 if waste is committed in one room of a house
 only that room merely can be recovered.

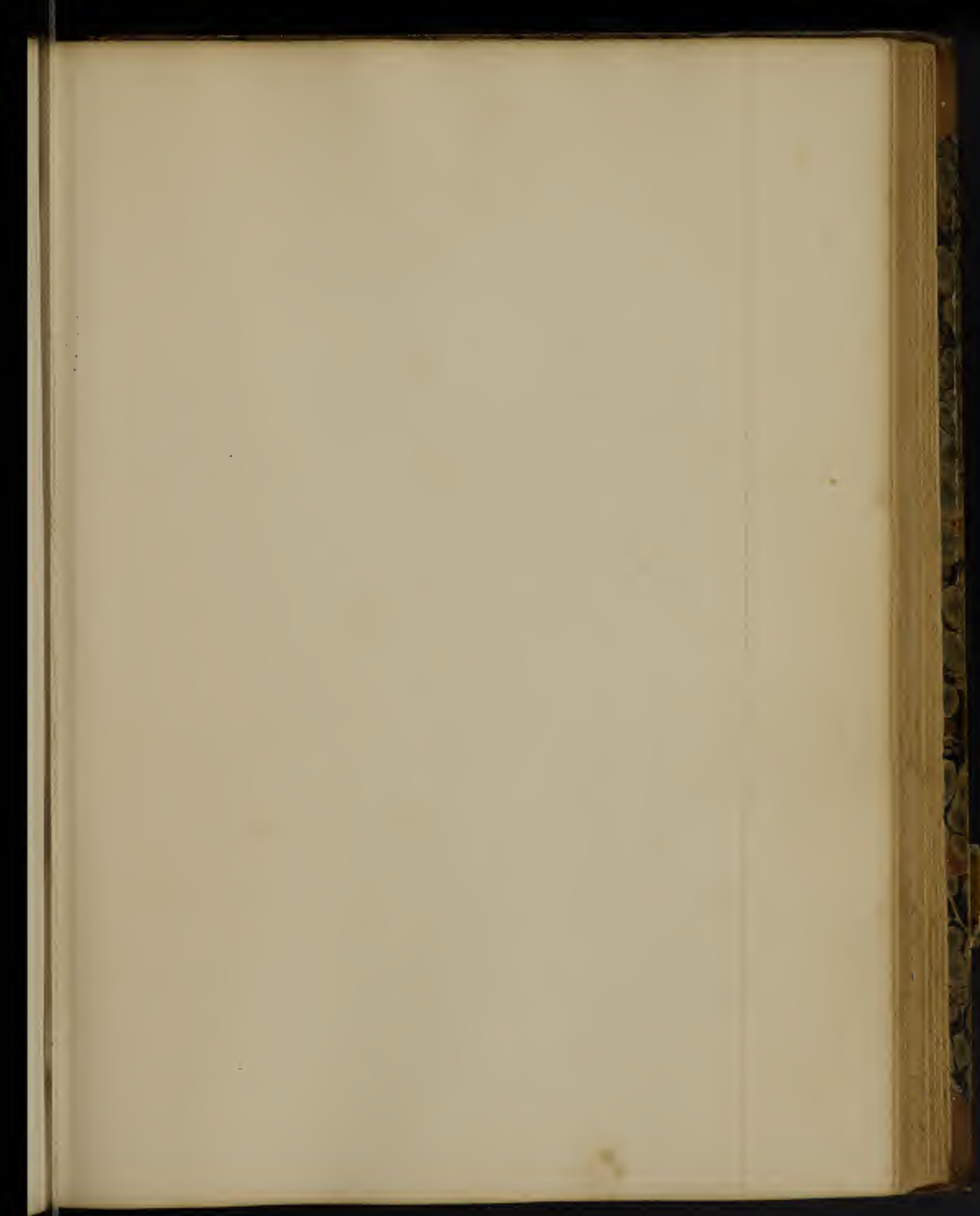
C. Litt 542

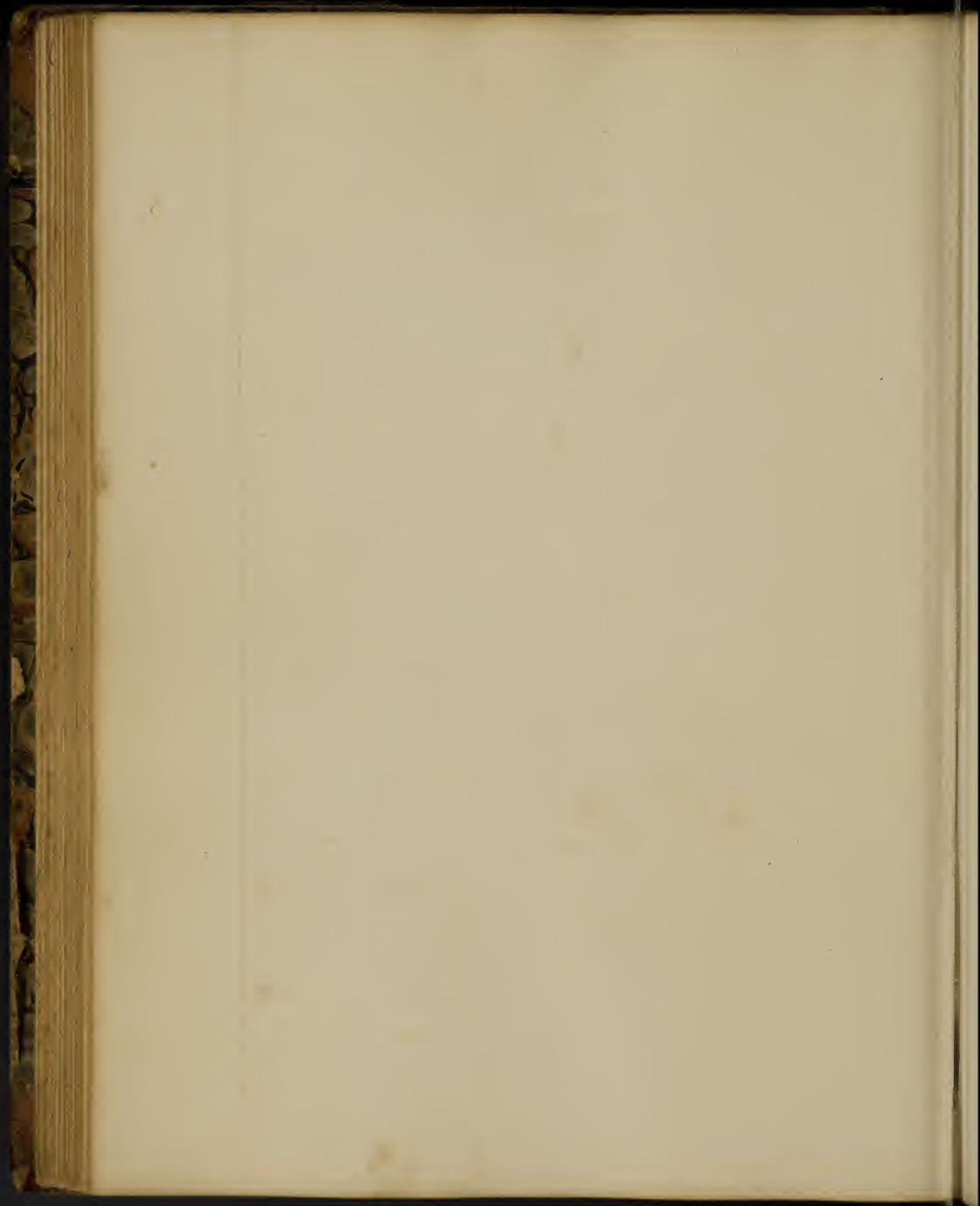
2 BL 284

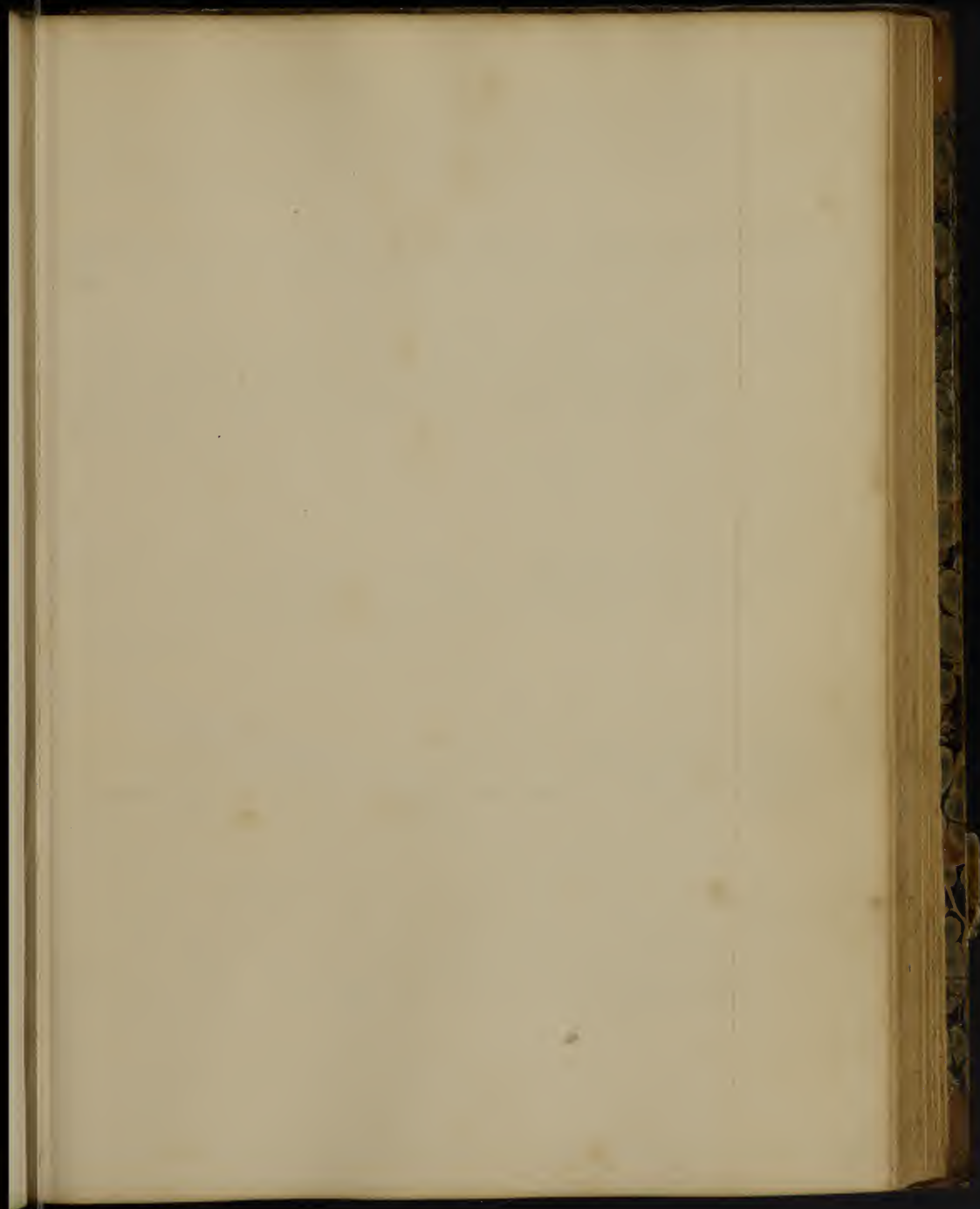
In Conn^t If tent in dower suffers buildings
fences &c to go to decay the County Ct. has
the power to provide a summary remedy

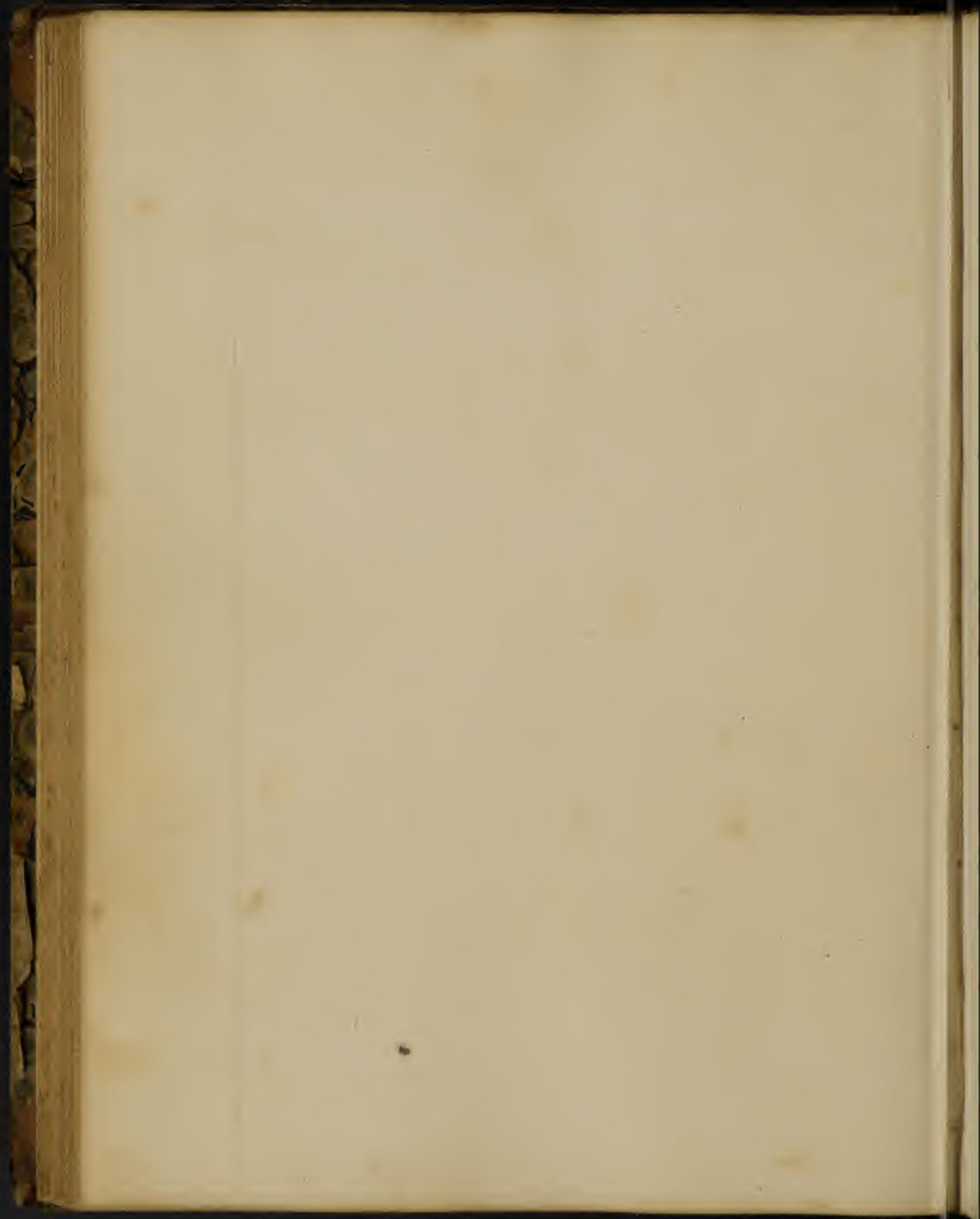












Ejectment (cont).

Under this title I shall treat of the English action of ejectment, & of our action of disseisin for real actions vide 3 Bl Com 167-198.

Ejectment is brought to recover lands or tenements of which the Plf has been ousted. so also is our disseisin.

Ouster is a generic term & includes both disseisin & dispossession. disseisin denotes ouster of a freehold dispossession denotes ouster of an estate less than freehold.

In the action of disseisin therefore the Plf sh^d allege that he is disseised in ejectment that he has been dispossessed.

Ejectment is in form an action in which a term for years is recovered with damages by the lessee Esp^d Dig. 427 when ousted from his possession - 9 Co 77. 5 Co 105.

Disseisin is an action by which one who has been ousted of a freehold recovers it together with damages. the form of our ejectment & disseisin are precisely the same the only difference between them is that the one is brought for recovering a term for years the other for recovering a freehold.

(57)
Ejectment, Our action of diseisin is strictly a mixed
Combd. action. the freehold and damages are recovered.
Comyn 250 but ejectment is not either here or in Engl? strictly
3 Bl 199. a mixed action tho' usually so called. -
2 Blwyn

3 Bl 157.8 Anciently this action was brought as it purports
200. to be by lease for years ag^t an actual ejector &
3 Wils 120. if lease was ejected by a stranger he was entitled
in this action to nothing but damages & the
lessor was to bring a real action ag^t the ejector
& then restate the lease. If the lessor w^d not do
this the lease was remediable.

for the remedy of the lease when ejected by the lessor
or by a stranger claiming under a title superior to the
lessor vide Bl 200. Now the term c^d be recovered
at least in the first of these cases but not
by ejectment but by action of covenant,
And even now the declaration in ejectment demands
in Engl? only damages in the old form still
remains.

(58)
2 Bl 200.2 & 66 of equity afterwards interposed & compelled
2 Bl aff¹²⁰ the ejector to make specific restitution of the
land and finally 66 of law adopted the same
method of doing justice & introduced a judge to
recon the term & a writ of possession thereupon

In this state the declaration demands restitution ejectmt
of the lands & our cts have held this to be misapp 1 Rost 408.

From Ea 4. cts of law have given judgt for the recovery 3 Bl 201.5.
 of the term & since then they give nominal damages 2 Bl 181.
only and a distinct action must be brought for
 the mere profits, which action is trespass

In Court the Plf has his election to recover
 the damages in ejectmt or to bring a subseq
action,

Since Henry 7th this action has been almost the 3 Bl 200.1.5.
 only method of trying the possession title to the 2 Burr 667.8.
freehold Bacon. abr. Eject. 2.

And the declaration in ejectment is now a
 train of legal fictions which have been devised
 for the purpose of trying in fact tho' not in form
 the possession title to the freehold. for the fictions
 vide 3 Bl 200-5. Bac Abr Eject 21.

In this state these fictions are not used. If the Plf
 is tenant for years he so declares if for life he so de-
clares &c &c.

Geclint

6 Co 6:7

3 Bl 187

Co Litt 257

See also 11

In real actions except that of assize no damages are recovered but the fructus recovered only for the declaration is merely that the Plf has better right than the Def.

For what things?

3 Bl 206

orc & 492

2 Sac 166

Geclint

Buller 49

10 Tra 54

Ex p. 29 427

2d Ray 789

Geclint will not lie for any thing of which the Shff cannot deliver actual possession on the exth. It will not therefore lie to recover in corporeal things for by possession in the rule is meant cor poral possession.

1 Burr 140

Sha 1004

Ex p. 29 390

428

1 Root 118

But the action will lie for land laid out for highway in favour of the owner of the soil but the owner recovers possession subject to the easement.

Day, Rep

On Stiles & Curtis on C. determined that this action would not lie to recover prop of highway.

(61.)

reclaiment will lie in favour of the owner of reclaiment
 the herbage of land merely the another owns Str 1120
 the soil. for the possession is in him pro temp^r. bro Car 162

Hard 303. 401

But the action will not lie for a water course Vel 1143
 so nomine but it will lie for such a tract of Prop 167
 land covered with water. 2 R 18.

Exp^t D 428.

And this action will lie for a certain part Str 695.
 of any undivided entire thing. as the half of Exp^t D 428.
 a house held in common

Who may maintain?

(62.)

It is a gen^l rule that no one can maintain 3 R 205. b.
 reclamation unless he has at the time of bringing Exp^t Dig 430
 his suit a right of entry. or what is the HH 7. 8.
 same thing a right of present possession not 5595. 8.
 does the supposed entry of the lessor of the 3 R 179. 82. 191.
 Plaintiff aid him or not an actual entry aid Comb 68.
 him if he had no right of entry 3 R 178.

(62)

Who may maintain - It of Limitations,

Ejectm^t ✓ The popery title is the only one wh^{ch} is
Act 3595. formally tried in this action. & if one has
3 Bl 150.190-a right of property & not the right of
Esp^d 431. popery he cannot maintain ejectment
3 Bl 150. but he must (in Engl?) resort to his real
action. Thus tenant in tail alien^{ed}, the
issue in tail cannot maintain ejectment ^{as the} alien^{ed} but they must resort to their real action
for they have not the right of entry.

(63)

Exp^d 431:2 And since 21 Jac 1. the leper of the Plf or
3 Bl 206. those under whom he claims must have been
Bull^{et} 10102. in popery within 20 yrs from the action
brought, ^{if they had the right of popery during that period} or he cannot maintain ejectment.
1 Burr 119 & the leper of the Plf must prove this
Runn 234. popery & the Def^t need not plead the
statute.

In this state an ouster of 15 yrs has the same
effect: and after a dispossession of 15 yrs in
this state the whole statute right of
the person ousted is gone. for in this state
when the popery title is gone the whole
title is gone. (vide post)

3 Jac & Both these statutes have the usual savings
Act 3595. viz that the stat. shall not run agst infant
feme covert, idiots, lunatics, & persons beyond
seas. (*not in our Stat.) and in this state if any
Bomst St person is an infant, feme covert, non compos, or imple,
Act 59. st. once at the term of the accruing of their title they
& when he are allowed five yrs after the removal of
their several disabilities to bring their action for
A right of entry accrues at the time of
eviction

Who may maintain - It of Similar (64)

But when the stat: has begun to run no defect, supervenient disability will save the title or will not prevent the stat from barring it. 4 J.R. 300

Thus a testator dies leaving an heir at least 83.
Law a woman of full age & another person 2 Com. 127
takes possession & she soon after the death of the testator marries if she does not bring her action within 20 yrs after the testator's death she cannot maintain ejectment

Successive disabilities cannot be joined within 83.
the saving clause of the statute so as to 4 Hall 112
prevent the stat from attaching.

Thus a man dies leaving a female infant of 20 yrs of age & another person takes possession & she marries before it she must bring her action 5 yrs after she comes of age or her title is lost.
Or 10 yrs in England

Our sup: Ct. once held contra by a divided Ct. 4 Day 295.
& judge was given one way, the decision another.
Our rule now is probably be the same as the English 2 Com. 127
rule. Bancroft & White.

(657)

The possession of the lessee of the Plf or of those under whom he claims must be an actual possession within 20 yrs
Stra 1142
Ball 102.
Esp^r 5432
Salk 421.

(658)

2 Burr 1291.
Esp^r Dig 453
Mum 118

But suppose that in this country as may frequently be the case in new lands, the lessee of the Plf he never saw the lands until just before the action brought & he bought the lands 50 yrs ago but no other person was in possession until 5 yrs before action brought. can the Plf then recover? I think that he can. in analogy to the cases of vacant possession.

In this state witht doubt the right of poss. if no other person has been in actual poss. is equivalent to actual possession & here therefore in the above case the Plf could unquestionably recover.

1 Saund 319. b If the owner of land brings ejectment within 20 yrs after ouster & is non ested this action does not prevent the Stat. from running to prevent the 20 bar. there must have been actual poss.

(66)

And an undisturbed possession for 20 yrs in
Engl^d, a 15 yrs ^{here} is not only a suff^t defence to
ejectment but is a good ground on which to
support the action of ejectment for this
possession gives a possessionary title

750492
1 Ban 119
Ban det bases
457
Exp^d Dig 432
Sack 421.
Bann 58.
Ed Reg^d 741.

And it has been resolved in N.Y. that a peaceable 20 years
possession of 3 yrs entitles him to an action of H. John 211.
ejectment ag^t a mere stranger. for as between
these parties the one who has been longest in
possession has the better right if he was first in
possession.

lik 181
25R 748
14 & 511

But this rule can hold only as between one
who has been in possession & a mere stranger.
and not as between him & the real owner

The soil in a highway cannot in this state
by exp^d statute be acquired by possession.
(after 1813). When there is no stat the opposite
rule must hold.

(66)
In Engl^d a possession of 20 yrs only gives
3 Bl 177:80 the possessory title & does not affect the ultimate
190-2. right of property. So in possession in Engl^d is necessary
22 p^o Dig 447 to acquire right of property in lands tenements &c.

Coat 58. In this state possession for 15 yrs confers the
68. 157. 412 ultimate right of property

All. 1 P 102 Successive ousters in continuity for 15 yrs will have
Exp^d Dig 431: but the dispossessor of his title thus D is dispossessed
4 Ban 2473. in it who continues in possession 5 yrs. A is dispossessed
2487. by B who continues in possession & C &c &c. A still
loses his property.

But in this case does C require a title so
that he can maintain the action agt
D still. I think that C is the true owner
for D has lost his possessory title & it must
be in somebody in whom then is it? in C.
as between C & D. (but as between the dispossessor
& must have the land.)

(67)
5 Ban 2604 But in all these cases possession which bars spectum
Co Litt 195. under the statute must be adverse. for the
3 East 297 stat goes on the ground that the dispossessor has
La Ray^d 140 abandoned his possessory title.

Salk 423

Exp^d Dig 433.

Hence one jt tenant tc who has been in sole possession 20 yrs cannot hold ag^t his jt tenant for the possession of one jt tenant is the possession of both same of tenants in common & coparceners.

If mortgage continues in possession for 20 yrs the mortgage is not barred for the possession of the mortgage is not at all adverse.

Exp^d Dig 433
Salk 423
Edw 3 146
3 East 297
Dec. Eq. S.S.

(68)

But an adverse possession by one of two jt tenants tc will bar the other's possessory title. If then one jt tenant tc claims the whole estate in virtue of 20 yrs possession he must prove the possession to have been adverse & what in such a case is to be deemed adverse possⁿ is a question of fact for the jury & from great length of sole possession the jury will presume that the possession was adverse. It is that there was an ouster same rule as to tenants in common & coparceners.

Comp 211
Salk 423
5 Burr 2604
60 E. 1456
Exp^d Dig 434
2 Bl 102
Comp 217
Exp^d Dig 434
17 January 18.
27-8.

If then a party in possession claims under a party out of possession no length of time will bar the possessory title of him out of possession thus l^{es} for 20 or 50 yrs. thus tenant at will. In this state it has been held that a tenant in possession by permission may gain title by 25 years possession but this decision is unsupported by any principle. (18. 222.)

(69)

The remainder man therefore is not barred by the possession of particular tenant. because during the possession of the particular tenant the reversioner has no right of entry & the statute never bars one who has no right of possession. besides the reason given for the genl rule on last page. viz that the possession of the particular tenant is not adverse to the remainder man a reversioner.

Bull. VP 1024 Where adverse possession is relied on by tenant at 1 Roll 659. will then must be some proof of an ouster of the landlord. but if tenant at will being in poss. openly claims under Sd. this is presumptive evidence of an ouster of the landlord.

(69.)

3 East 297. Possession by a stranger under claim of title is always adverse to the owner. by a stranger is here meant he who has no right at all from the owner.

Dryg 460. Where the action is brought by the lesor founded on 3 Burr 1897 a clause in the lease giving a right of entry on lesor's De. 407 breach of certain conditions. the lesor had not actually entered before action brought. because the Bull. VP 103. confession of lease entry & ouster is sufft under 1st and 319 } the common rule.

1st 216.

1 Vent 42, 332 } contra but not law.

Salk 240. }

Exp' De. 466 }

And this last rule is gone where an entry is required to complete the Plf's title. But where entry is required to complete the rebut the title of the def't derived from another actual entry is necessary. Ex gra if a limitation is made to A for life remainder to B in fee & A forfeits by aliening in fee here actual entry is necessary for entry by B is here required to rebut the title of A

Doug 467
1 Sam 367 N
287. n.
Exp^d Dig 466.
450. c.
3 Ban 197.
Dall AP 103.
2 Stra 1086.

The reason is in the former case the very breach of the condition reverts the lessor's reversionary title & the entry required is merely pro forma. But in the other case B's right to take possession does not accrue until the entry of B. for B must show that he intends to treat the act as a forfeiture.

(70)

The only person who can maintain this action is he who has the legal right of possession thus mortgagor having the legal right of possession may maintain this action either before or after forfeiture.

Doug 21
Exp^d Dig 435-6
Ch 240.

But if lands first leased to A and afterwards mortgaged to B. B cannot have ejectment against the lessee. but it was once held that the mortgagor might maintain eject: in such case provided his object was merely to compel the lessee to pay rent to him. provided he gives notice that this is the only object.

sed contra. the rule is now well settled otherwise.

Doug 23-64
Exp^d Dig 435.
5 All
Mortg^d 22.

Tho' a mortgage debt has been fully satis-
fied yet if it was not paid on the day the
1 Ann 187 mortgage may maintain ejectment for at
2 Lb. 30. 187 law the legal title is in the mortgagor if
2 Day 151. the debt is not paid on the day.

2 Vent 279 1 Eq. Cas 333.

17 R 76. 26.

2d Nat. 63.

57 R 2. 122. And it is a genl rule that he who has the legal
Dulle v R.C. title to possession may recover in ejectment agt the
Dong 95. person who has the equitable interest. ^{known possessor} thus trustee
27 R 684. may recover agt cestui que trust in ejectment.
1 v. R. 4602

(Sh.) If A covenants to sell land to B but neglects
to execute conveyances & B goes into possession
A may recover the land in ejectment agt B.
even tho' he has ~~the~~ the rec^d the purchase money.
Comp 597 Bea vs Marshall in Compes contra but not law.
473. Dong 22. 695. 747.

27 R 696. Yet where the person having the equitable title
57 R 122. has been long in possession the Ct may instruct
77 R 3. 47. the jury that they may presume an extinguishment
Dulle v P. 110. of the Pl's right. as in case of satisfied mortgage
53 R. 3.

17 R 622. 755 In several modern cases the Ct of law have
27 R 695. 6 relaxed the genl rule & have taken notice of
14 R 324. trusts in the action of ejectment. but these
447. cases have been of late disapproved and quere

77 R 3. 47. 57 R 576. 7 East 23. Comp & Thoms properly
Ch. R. 5. 112.

The Def in ejectment must recover by the strength
of his own title & not on the weakness of that of the Deft. Hence as a genl rule the Deft may Bull. 10 P 110
defeat the Plf if he proves that the Deft title Exp. Dig. 455.
is in a stranger

2 Day 227 a
(437.)

The case in 2. Day as reported contradicts this rule but
it is said that the objection in that case was to the 1st 2509.
deed offered in evidence by Deft & not to the proof of title in Is.

This rule cannot hold where the Plf holds under 7 RR 480
a title from the Deft nor where the Deft holds 15 RR 760
title under the Plf. for in both these cases the Bull. 10 P 110.
Deft is estopped from proving title in a stranger. Exp. Dig. 457
Thus mortgage brings ejectment as mortgage
thus mortgage makes a lease & sues the lessee
in ejectment. - rule the same if the lease was
verbal.

The devise of a term for years cannot at com. law 70
law maintain this action till the Ex'r has. Exp. Dig. 436
apportioned to the legacy or devise. Asper 190:1
Pon. D 158.
1877 5244.

This rule does not hold in this state.

But in case of the legatee is not specific
the legatee cannot sue until after distribution

But the devise of a freehold may maintain
Exp^d Dig 437 action immediately on Devisor's death
Pon^t Dig 23

Exp^d Dig 437 The Assignees of a bankrupt may maintain this
2 Day 70. action for lands belonging to the bankrupt
for the stat. transfer the legal estate.

Att¹ 215. If an action is to be brought in favour of
Att¹ 16 one non compos it must be brought in the name
2 Mil 130.1. of the non compos by his conservator or committee
Exp^d Dig 438.

4 Co 75.a An ex^r or administrator may maintain this
2 Vent 20 action for an ouster of a chattel real belonging
37 R 13. to the deceased, whether the ouster was of the
Exp^d Dig 439 deceased while alive or of the ex^r or administrator
after the death of the dec^d.

By the common law in general an alien cannot maintain ejectment, because he cannot hold land but 45 R 300 as he may hold a house &c as before & therefore he may 2 B L 249 maintain ejectment for a house. 293. 2744

This is in genl the law in these states. But in some 760/16.
of them the rule has been relaxed by stat. or conv.
and ex. clasp? article alien

But when an alien becomes naturalized he may
 maintain a claim for land

4 Do 133. 136.

the declaration must show a subsisting title at the time of action brought & if the depon has not exp'd his title at the time of action brought he can't recover. It is said that he must state the precise length of his term if he alleges for 50 yrs he may recover for 50. if he proves title to term for that term.

257
Section
Findings

In the English action the declaration ^{need not} state a day on which the paper entered he must
3d Diff say that merely that he has a lease and
afterwards entered for under the common rule
the day is not traversable

The great object of the common rule is that the
title may come fairly into court. the
therefore have slept the case of all unnecessary questions

In this state the declaration alleges that on
a certain day he was possessed & seized & that
afterwards on a certain day the Deft with fire
and arms entered & ousted the Plf.

But 18106 The master should always be alleged to have
bro 196. happened after the accruing of the nominal
Exp 181445. Plf's title for the record must be consistent
18107. If however the Plf sh^d declare that on 1st Jan
1825 his title accrued & that afterwards
to wit on the 1st of Jan^y 1824 the deft entered &c
this is good except on special demurrer for
the Ct will consider the words "to wit on the 1st of Jan^y
1824" as surplusage

It is said that no particular day need readings
 be alleged for the meter it is said that if, Bro 431.
 it appears to have been after the Plf's title has Exp^d 2441.70
 accrued it is suff^t but I think that if
 no particular day is alleged in the declaratⁿ
 it w^d be good ill on special demurrer but
 under the genl rule the day perhaps is not
 very material. still I think that a cause
 longer w^d allege the particular day.

The land to be sued for must be described in 2d Ed Reg 7470
 the declaration with all convenient certainty Comp 250.
 the rule was formerly much more strict. & Stra 834
 it was formerly held that the description must be 909.1 Dal 154.
 suff^t accurate to enable the shff to know the land. 1 Bun 224.30.
 3 Wils 23. 1 East 441 5 Bun 2673. 15 R 11.
 3 Mils 23. 1 East 441 5 Bun 2673. 15 R 11.

The plea of the Plf must point out the Stra 71.
 land to the shff at his peril. & if the plea 1063.
 shows to the shff little land from that for all he can 350
 recover in judgment he is liable in trespass. &c

In this state we describe the land as lying 3 Mils 23.
 in such a town & to describe it by its abuttals 750 333.5
 but here it is not usual to mention the parties 2 Bl 270.
 usual state^{spec} of land. as meadow &c. tho' we Dal 12109
 genlly state the estimated quantity. the Exp^d 2441.70
 parish & species & quantity must be stated in 2 Chetty
 Engld. Callis Enten

(77)

Headings

If there is a mistake in the parish in
Lra 595. Engl? or town head the mistake is fatal
Eld 459 for the parish or town enters into the description
2 Bl 271.
2 East 497:9. 501:2.

34r 334. But the Plf is not bound to declare for the
com 266. exact quantity which he can recover he may
bro 13. declare for 100 acres & recover 5 acres. This rule
Eld 447. applies to chattels in trespass & to land
2 Bun 326. in trespass quare &c. But plf can recover no more
than he declares for.

If he declares for a longer term than
he has he may recover for such months
as he has, provided it be less than three

years 106 he declares for.

Ex post 41.6

Ejectment (182)

The deft may deny that he was in possession when the action was brought. & tho he may 1 Will 220 have committed an actual ouster yet the Rf. Stat. 1810. cannot recover unless the deft is in possession 77 R 327. at the time of action brought. & the Rf 1845 573. must always prove the possession of the deft Exp Dig 453. at the time of action brought unless indeed it is admitted in trial.

In Ejectment the genl issue is not guilty in 3 BL 355 & 3. In the genl issue is no tort nor trespass. App 9:10. In the English practice special pleas in bar are 2 kinds & very uncommon for the common rule requires. Rant 190 238 the deft to plead the genl issue - (genl) Bar abt

In Count special pleas in bar are as common. Rant 180. as in any other action. for we have no pretences 3 BL App 577 & therefor no common rule.

Evidence:

The Deft may recover by proving title in a Bull Nemo. stranger but the title must be a valid Exp Dig 456.7 subsisting title. the Deft must prove possession in the stranger within 20 yrs.

28
Pleading

Evidence

1 Bar 117

The st. of limitations must be pleaded under the genl. issue. The common rule is the only reason for it. At com. law the st. of limitations must always be specially pleaded.

Exp^d 156

If the Deft. declares for several subjects he may recover one wth recovering the rest & tho' the declaration sh^d be ill as to some he may recover other things if the declaration is good as to them.

Exp^d 147

Where the Plf. declares for land on w^{ch} buildings are standing the buildings need not be mentioned for the vicarings will go with the lands and are comprised under the term "land"

Alt^r 151

If the Plf. recovers judgment he is entitled to a writ of ~~possession~~ ^{possession} habere possessionem & under this Exp^d 147 the shff. is required to put the Plf. in possession & to turn out all other persons out, not only the deft. but third persons

This is the only civil process on which the Plf
may of course break the outer doors & windows, & Co. 91.6
of the mansion house of Deft vide "Shffs" 2 Bac 179

See also 702

In this state if the Plf sh^d acquire possession 1 Root 73
pending the suit he is entitled still to damages
& full damages tho' the usual practice is to
bring trespass for the damages & to recover only nominal
damages in settlement & the Plf in this case of course
recovers his costs.

In Engl^d if the Plf regains possession l^{te} paid. Hel. 100
the Deft may plead this in bar but after issue Exp^d Dig 450
is joined it is discretionary with the Ct to admit
or not to admit the plea.

If the term sued for expires pen l^{te} the Plf may 7 Root 308
still have damages & costs for the original trespass l^{te} 1055
still remains tho' the term is expired

Co. l^{te} 255.

3 Mod 247.

Exp^d Dig 492.

See also 602

1166779 If after the Plf has been put in possession
 2 Dec 180. the Deft again ousts him the Plf may have
 a new writ of fa. ha. pbs. or he may proceed
 agt him as for contempt of court. If he
 takes the latter course the Deft may be fined impria
 mea &c.

For new trials vide "new trials" & H. Bun 1224
 Stra 1106. Exp' Dig 490. Jack 648. 550. Ed Ray 514.
 5 Dec 253. tot trial.

Trespass quare &c for mesne profits.
 3. 86205. The verdict when in the Plf's favour proves
 Exp' Dig 494. that from the ouster the Deft has been
 a trespasser for when the Plf is put in
 possession, by fiction he is deemed to have
 been in possession from the ouster & hence
 is derived the right of the Plf to bring
 an action for the mesne profits and this
 action is called 'trespass for mesne profits'

After ejectment the Plf may have the ^{mesne} profits 3 Wils 121
 action of trespass quare te fa mesne profits 3 Wils 121
 the rule of damages is in genl the value of the use of the land during the Deft's poss. 3 Bl 205.
 but if extraordinary damage has been done Gro C 132
 these damages make a true item. Exp^d D 474.3.

The declaration in this case may lay the 2 Dec 181.
 trespass with a continuando from the time of 2d May 1777
 the ouster to the time of the Deft being put back at 502
 in possession. this is declaring according to the legal book of
 effect for by fiction the Plf was in possession from the instant
 the time of the ouster. 3 Wils 121.

Or the Plf may state the facts precisely as they
 are is that on such a day the deft ousted the
 Plf & continued in possession so long.

This action is inseparably incident to the 3 Wils 121.
 action of ejectment. It is said indeed that 1 Vern 105
 the Plf may bring a bill in Chancery for an 2 Dec 181.
account ^{for the profits} in this bill the deft must be treated Exp^d (h).
 as a bailiff, but this is out of use.

Mere profits.

3 Bl 205 For the necessity of this action of trespass vide
 3 M & H 119 authorities. It is indeed said that the Pl^t can
 but recover for the mere profits in ejectment
 2 Bac 181 But the rule & practice is otherwise. In
 Georth "Eject^{mt} on principle damages can be recover^d."
 "res^d 79" only for the first days trespass, & for the other
 damages accrue while the Pl^t is out of poss.
 In this state the Pl^t may recover the whole
 damages in the action of ejectment still
 our practice is the same as in Eng^l, such
 is the established rule in this state.

6 Mod 222 In the action for mere profits the Pl^t need not
 2 Bac 181, ^{q. 10.} prove by witnesses the entry of the Deft^r for the
 1 K 424. record in ejectment is conclusive evidence of
 the ouster by deft. — But the Pl^t is not
 in proof confined to the time of entry &
 stated in the Eject^{mt}. He may recover for
 preceding profits if he can prove title & before,
 Bull N 37 This record however proves the ouster only from
 3 Bl 205, & the time of (the seizure & the ouster as laid in the declaration.
 Exp^d Dig 494 If the Pl^t claims for any other trespass he must
 prove it by other witnesses & all may be put
 into the same declaration. — the trespass
 comprehended in the declaration in ejectment
 is conclusive only of the Pl^t's title for the time
 comprehended in the declaration, and as to this
 the deft cannot controvert it. — i.e. the record
 in ejectment proves the Pl^t's title at the time of
 the ouster laid but not before that time

Mesne profits

The record in ejectment is no evidence in an
action agt a stranger to the record is a prior
spectante as to him it is res inter alios
acta -

1 H & 239
Exp & Dig 441

This action for mesne profits is in the power of Bull. 128
the st of limitations as to trespass the plf then Exp & Dig 445.
can recover only from for 6 yrs profits before actions 22 205 a
brought & only for 3 yrs in Count ---

In Count full damages may be recor?
in ejectmt. Can the plf in ejectmt
recover for more than 3 yrs profits. - No.

This action for mesne profits may in Engl. be brought
by the real plf or by the fictitious plf when
brought in the name of the nominal plf if he
in violation of the real plf's right (he is guilty of contempt) makes a release to the Deft. this
rule of course supposes the nominal plf to be a
real person as he frequently is.

1 Burr 665
Exp & Dig 445.
2 Bull. 1289
Salk 261.
3 Blot.

And tho' no doubt in this case w^d not allow
the release to be pleaded This has been done
in similar cases.

(85)

This action may be brought after recovery in
1 Mil. 118 ejectment agt joint tenants tenants in common
Platt 5323 & coparceners by their partners this is an
Esp. Dig. 495. exception to the genl rule that trespass cannot be
maintained by one jt tenant agt another &c. side.
It tenants &c. Because this action is
incident to ejectment. and
Disseison S. 323. Contra West v. Barker.

(87/

(89)

(91.)

Trespass quare domini propter

This action lies for injuries done to real property.
The injuries for which this action lies are nuisance, as
caster abatement intrusion discontinuance &c &c

When an injury is done to a house, the injury is called comparatus
trespass quare domini propter. - 3 Bl 209 Jus d l

The trespass remedied by this action consists in one 3 Bl 209
persons entering upon another's land and doing some comparatus
damage, with lawful authority. Insad

And when there is an unlawful entry upon another's
land the law always implies some damage. & actual
damage need never be proved except to enhance
damages

Every unwarrantable entry upon another's land then 3 Bl 209 10
is a trespass & is called 'trespass by breaking his close'. 2 P D 380
Fitz 878.

In certain cases entry upon land of another with 3 Bl 212
actual permission of the owner is warrantable. 8 Co 146.
Thus a sheriff to execute in legal manner lawful 2 P D 380.
process may enter on land or peaceably into a
dwelling house

Thus one may enter to demand or pay money payable
at that place. -

Thus one may enter to distress for rent.

Thus a reversioner or remainder man may enter
to see that no damage is done. -

Thus all travellers may enter in order to obtain refreshment &c.

(1)

Trespass quare clausum &c.

Thus also if one leases land excepting certain trees
10 Co 46. the lessee witht permission of the lessor may enter to
11 Co 52a cut down the trees &c.

Shep 89.

Exp^d Dig 381 "Jury 58."

Exp^d Dig 380 Thus also one person may enter upon another's land
3 Bl 312:13 for the purpose of destroying noxious animals. & this
15 L 334 for the public good.

2 Bul 62. But the hunter in such case may not dig the soil.
(Comp^d Dig Tres. d. central)

Black 556. Animals not noxious may not be pursued on
Exp^d Dig 404. another's land. This rule is strictly enforced in Engl^d.
3 Bul 61. not so in this country.

Black 556. It is indeed stated that if a starts a hare
Hollo 75. upon his own land that he may pursue it upon
the land of B. sed quere.

(2)

Black 556. By com^d law if an animal fera natura is both
Exp^d Dig 404. started & killed on my land it is my property.
This is not practically the law here, in all cases
here the property belongs to the hunter

1.4 Bl 551.-51. It was formerly held that a poor person might
Hill v 253. after harvest glean upon the land of another
3 Bl 262. but this has lately been held not to be law.
Exp^d Dig 413.

8 Co 146. Where the law gives one a license to enter upon
3 Bl 213. another's land a subseq^t abuse of that license
bro 145. makes that party a trespasser ab initio. &
Exp^d Dig 351:3 proof of the abuse will support the allegation
15 R 12. of having originally trespassed. for in such case
the party is presumed not to have entered under
license of law. and beside in such case the law
annexes a condition to every such license that it shall not
be abused -

But it is not every instance of improper conduct
 whh will thus make him a trespasser ab initio 5 Co 146.
 & mere nonfeasance does not make him a trespasser
 by relation. 3 Bl 213
 Exp. Dy 383.3
 5 Dec 1672.

And the act whh will make him thus a trespasser
 must itself be a trespass, or comprehend a trespass
 it must sound in force & arms.

- (3). If a party having lawfully distrained refuses 5 Dec 162
 to deliver the distress upon tender of sufficient money
 this tho' a wrong does not make the party
 refusing a trespasser ab initio. But if he kills
 or beats the cattle distrained he becomes a
 trespasser ab initio.

It is true however that if a Shff having made salk 409.89
 an arrest on mesne process neglects to return his Exp. Dy 412
 and he is a trespasser ab initio. But this Corp 20.
 has no connection with the doctrine of trespass 1 Wils 171.
 by relation. the reason of this rule is that Bac Ab
 the Shff cannot give in his writ for evidence in trespass (b)
 he therefore has nothing whereby to justify his
 entry. A process not returned is no evidence in
 favour of the party omitting to make the return
 When a person enters upon another's land or into 8 Co 146.
 another house upon an actual license from Co Litt 143.
 the owner, no subseq^t act will make him a
 trespasser ab initio. he must indeed answer
 for his subseq^t acts but he is not to answer for
 his original entry. for here the law annexes no
 tacit condition for this is an express contract
 between the parties.

(3) Trespass quare clausum - act need not be voluntary

It is laid down that to constitute a trespass the act complained of must be voluntary, and that if the act be involuntary & without fault no action lies

tresp q.1. Now this rule is precisely the reverse of the genl rule for he who by a forcible accident injures the person or property of another is liable in a civil action of trespass tho' it was done by the most excusable accident.

416 B4. The rule first stated is never true where the accident was by the person of the Deft. the fact whether the trespass was wilful or by accident will indeed make a material difference in damages but if forcible and done by the person of the Deft the action will lie.

119. He who does an act from which he or a third person must suffer ought certainly to bear the loss.

246 C 89. No will mistake or any accident not inevitable excuse him who has done a forcible injury to another, in his own person. tho' the fact of the mistake he will mitigate damages

This rule applies only to those cases in which the act complained of was committed by some agent for whom a for with the Deft. is responsible. in such case the act must be voluntary on the part of the Deft. or he cannot be subjected in this action. Thus if my servant commits an injury with my consent or privy, I am not liable in an action of trespass.

4 Ban 262
20 Pl 161
Exp^d 203
Litch 119.
13. 110.

Trespass quare clausum - Who may maintain?

Trespass quare clausum is an injury
committed in land lying in a foreign country, for
the subject being local the action is also. The
rule is diff^t with respect to personal property for this
has no settled home.

4 H 503
Str 646.
Comyn Dig
Fres 2.
Esp^d Dig 102.
"H 2654"

Who can maintain this action?

No person except him who has the actual
possession at the time of the injury can
maintain this action -

for this action is adapted mainly to
injuries to one's possession - Trespass means an
invasion of possession.

3 Lev 209
Tatcl 263.
Esp^d Dig 383. 101
Comyn Dig
Fres 613
2 Buls 268
Bac Ab tr. C. 283

In the case of personal chattels, constructive possession
is suff^t but the law knows of no such thing
in constructive possession of real property.

In this state right of possession of real estate is "Eject 68"
i.e. if no other person is in the actual possession
as where an heir inherits property and has not
taken actual possession he may maintain this action
unless some other person has taken actual possession -

It is said in the old books that to entitle one
to this action the possession must be peaceful.
& that an intruder cannot maintain this
action,

2 Leon 546
2 Leon 149
4 Leon 114.
5 Bac 166.

(6) Who may maintain trespass quare clausum &c.

But this as a genl rule holds only between a wrong doer in possession & him who has the right of possession thus far undoubtedly it does hold.

that is the wrong doer in possession cannot maintain this action ag^t the owner of the right of possession. For the owner by the supposition has a right of entry.

1 East 244-6. But any actual possession is suff^t to support the same action ag^t a mere stranger. formerly not so.

3 Barr 1563. If A is dispossessed by B - B may maintain an action of trespass ag^t C. - or ag^t any stranger who commits

1111 1258. a trespass during B's actual possⁿ - If C

1111 1258. commits a trespass on B while in actual possⁿ, the law will not inquire concerning B's title

2 Roll 554. The person in whom the freehold is can't generally maintain this action for an injury done while another was in the lawful possession of the land.

4 Leon 134. who has land trespassed upon is in the possession of lease for years at the time of the trespass committed to C. 3.

the lessor & not the reversioner he must bring this action. For the reversioner is neither actually, nor constructively in possⁿ.

(7) 1 Exp 404 And by the comm. law an heir on the death of his ancestor cannot maintain this action until

3 Barr 63. he by himself or agent has entered on the land

1111 142. but if he afterwards entered he may maintain this action ag^t a trespasser who committed the

2 Roll 553. trespass before he entered. for he is then seized by relation. but in this case he must enter before he commences the action.

But this rule does not obtain here for the right of possession is here equal about to actual possession. if no other person has the actual possession.

A person deprived of land cannot maintain this action for an injury done during the deprivation unless he has entered before he commences the action. Exp^d Dy 418 if however he enters after the injury he may bring Dy then commence this action for by fiction he has entered. It is deemed to have been seized during the whole 2 Roll 533 time. & he may maintain the action at the 5 Bac 166. depriva for injuries committed by the depisor 11 Co 51a during the deprivation. Deacons v. Deacons 302. 4678

2 Roll 537 2 Roll 534

But if the estate of a depisor determines during the deprivation it seems that he may maintain this action for an injury committed during the deprivation. Ex necessitate

And in the case of the action against the depisor he may lay his action with a continuando. 2 Roll 537 or he may state the facts as they actually were that he was ousted on such a day. 2 Roll 537 or he may state the facts as they actually were. 2 Roll 537

The modern practice is now to lay trespass with a continuando but now it is customary to lay it disjunctly & severally from the 1st of March to the first of Sept. a continuando is indeed now as good as ever but not so much practised.

(8) Who may maintain trespass quare clausum &c.

1. Depositor cannot even after recovery maintain this action ag^t a stranger for injuries committed during the dep^o for this fiction exists only as between the dep^o & the dep^o. Thus dep^o is himself dep^oed by D. now the original dep^o cannot maintain this action ag^t D. ^{contra} 2. Roll 534, 579 but must take his remedy ag^t the first dep^o. Same if D. purchases from the dep^o. This fiction can never be extended to strangers to make them trespassers in law ag^t those upon whom in fact they have not trespassed. But in this 5 Bac 188. & 189. the first dep^o is liable for the whole 2 East 244 & 6 time viz during his own dep^o & that of 11 Co 51. b. the second, —

11 Co 51. 2. But this rule holds only as to this action of trespass quare clausum &c. & not as to the property while the stranger may have taken from the land. If therefore dep^o is dep^oed, the owner may take the profits 5 Co 85 a. of the land during the second dep^o whenever he 4 H 6 132. can find them, or he may demand the property of the second dep^o and D. thinks may maintain trover for them tho' the authorities do not go as far as this —

Comyns Dig But the rightful owner before recovery may have the Tres b. 2 action ag^t the dep^o for the act of dep^o itself 2 Esp^o Dig 418 & 44 that is for the trespass of the first day, for that trespass was committed while he was in actual possession, pot 52'

So a party disseized may maintain this action during the disseizin for a trespass committed before the disseizin either ag^t the disseizer or ag^t any other person. - The law requires only that a person sh^d be in possⁿ at the time of the injury done. not at the time of the action 604

2 Roll 553

5 Bac 168

tr C 3

This action may be maintained by a person in possⁿ of a freehold, term for years, estate at will or estate at sufferance & indeed any one in possession of the land trespasses upon whether he has any property in the land or not.

1 East 244. 6.

Comyn 8

2 Esp 61. 2.

3 Roll 551.

5 Bac 167

tr C 3.

But a tenant at will or by sufferance or a disseizer can maintain this action only as ag^t a stranger & not ag^t the landlord or rightful owner.

2 Bl 500. 150. 15

Co Litt 57.

But it seems that now tenant at will may maintain this action ag^t landlord. for tenants at will are now tenants from year to year. & tenant from year to year may maintain this action ag^t his lessor.

2 Bl 175

1 Sid 347

See as to tenant by sufferance 6 Can & P 284.

Tenant for years during his term may maintain this action ag^t the lessor. For during the term he has a complete right to the possⁿ.

5 Bac 187 tr 2

1 East 139

And it is agreed in the old books that if the lessor invades the emblements of the tenant at will the tenant at will may have this action ag^t the lessor or at least trespass w^o lie tho' perhaps not trespass q. c. -

2 Bl 146

Comyn 8

Trs 61

Bro 143

Esp 212

(post 21)

(10) Who may maintain trespass quare clausum etc.

It is said in the old books that tenant at will
1 Sid 247. cannot maintain this action against one who has an
Dac 107 colour of right. but this is not law for by
to C 3. colour of right clearly cannot be meant
(contra 2 East) a groundless claim of right - this w^d be
2 M. 6. a reproach to the law - any stranger might
(11) do claim in this way -

Comyn Dig It is said that lessee at will may maintain this
Fos 6. 2. action against a stranger who injures the land while
2 Roll 551. the land was in possession of lessee at will, but since
tenants at will are discharged this rule is now not
law. or rather this rule has no application

5 Bac 167 res. If the lessee for years reserves the trees he may
post 24. 5. maintain the action of trespass quare clausum
during the term against any one who cuts down the
trees. &c. for the land on which the trees grow are
lessee's. ~~they are~~ ^{they are} impliedly reserved with the
trees. -

5 Bac 167 res. A person entitled to the pasture or herbage of
Comyn Dig land merely may have this action of trespass
Fos 6. 1. quare &c. against any one who injures the herbage.
Pro C 121. for the possession of the herbage is necessarily for the
3 Roll 547. time being the possession of the land.

552

3 Leon 213

3 Bl 120 The rule supposes of course that the lessee of the
6 East 602. pasture is in possession either actual or constructive.
3 R 210.

And the owner of the herbage has the action tho' the person enters by permission of the owner of the land. And therefore aft^r the owner of the land himself - The owner of the land is not owner of the herbage -

The owner of the land need not in any case be in possession of the land at the time of breaching tho' b. 2 the action. for the injury is complete if the owner of the land was in possession at the time of the injury done. Plowd 241. The right of action accrued & was complete 5. Dec 167 during his possⁿ & this right cannot be divested by a sale &c of the land, b. c. 3.

And the action of trespass quare &c lies as well for injury to land uninclosed as to land inclosed. 7. East 207 for a more close or clausum in y^eng declaration 6. East 154. does not necessarily mean land inclosed with a fence but any land or part of land in general. Stra 1004. 16. Pi 173.

The owner of the soil of a highway may have this action for an injury done to the soil. It is thrown open to the use of the public as an easement but still the land belongs to the original owner - as also the trees growing upon it as also the minerals or fossils under the surface of it. The public have a right to use the highway but they have a right to look at the sun or moon, but they have no right to the surface of the one more than the other.

(12)

Who may maintain trespass quare clausum.

When a highway is laid over the land of another the fee remains in the ~~adjoining~~ proprietor & when rights the highway are not necessary for the purposes of a highway are in the owner of the adjoining ^{land} proprietor.

Now the ancient highways were laid out while the land was in the possession of the proprietors of the town. & in such cases the right of soil in the highway belongs to the corporation of the original proprietors. but if the highway was laid out after the land was divided between the proprietors then the general rule last stated holds viz the fee is in the owner of the adjoining proprietors.

May 1810. Trespass or disturbance will lie to recover any part ~~the~~ ^{the} courts of the highway, subject to the easement. But in Born the subject is altogether confused.

(13)

~~1843~~
2 Coll 565.
5 Jac 165.
2 K. 3
Sw B

Where A owns land & is let to B to be tilled by B on agreement that they are to divide the crop if a trespass is committed on the land, according to some A must bring this action alone. but by the same opinions A & B may join for injuries done to the crop. But I think that the party raising the crop ought alone to bring the action quare clausum perit. & that A can neither maintain the action alone or join. for B is in possession of the land. and in law B is owner of the whole of the crop but bound to pay part of it to the owner of the land, as rent. And this is in accordance with a later opinion.

Bull. N 285
Exp. Dig 102

(10) For what injuries trespass quare clausum &c lies.

1. 12 Lk 248 But the party trespassed upon cannot have both actions if he brings trespass he cannot abandon that action & distress, neither if he distress can he afterwards bring trespass. unless with his neglect they (Nide "Replevin") escape
- 5 Bac 179
12 Lk 248.
Dep. Dig 387

1. 12 Lk 665 It has been held that if A by a tortious act puts the cattle of B onto C's land C may distress them as damage feasant, and B must take his indemnity of A. C has no occasion to inquire when he sees animals trespassing - whose they are the only inquiry here is were the cattle trespassing.

5 Bac 261.
Distress.
1 Dep. Dig 707
Comyn Dig
5 Bac 1.
2. 12 Lk 553. In this case B w^d not be liable in trespass for he is no fault, either actually or constructively. The animals are mere instruments of mischief in the hands of A - & the case is the same as if A sh^d use B's cane to commit an assault or battery.

2. 12 Lk 595 If a tree of A is blown over onto the land of B, A may remove the tree in a peaceful manner & no trespass lies. - B has no claim to the tree. the property continues in A but this claim w^d be futile if he c^d not go onto B's land to take it off.

Doug 719 n.
5 Bac 178.

3. 12 Lk 195. But seeing if A in topping branches suffers them to fall on B's land.

Doug 719

If A's timber floats upon B's land & does injury A is liable on an action of trespass on the case. But I think that this rule applies only to cases where A is guilty of neglect. 2 AB 257:8

If A's horse is stolen & put into an inclosure of B. A may go onto the land of B & take the horse. - Here again A's property is, without his fault on another's land & he does not loose the property &c. ut supra page 16. 2 AB 555 5 Bac 178 Jones p. 1.

If the fruit of a tree falls onto B's land A is justified in going after it. This rule appears to decide the question to whom the fruit of a tree belongs when branches overshadow another man's land. Latib 120 5 Bac 178. Jones page 1.

(17)

It is said that if the roots of a tree standing
on A's land extend into B's land, A & B are tenants
in common of the tree & fruit. But if the roots
do not extend into B's land, the branches
overhang B's land, yet the tree & fruit belong to
A. sed multum quare. the law tends to
controversy & confusion. & is inconsistent with
the rule last mentioned - If they are
tenants in common they are so in proportion
to the quantity of roots in each - & how
can this quantity be determined -

1 Moody & Malkin 112. the property in the tree is in the
owner of that land in which the tree was first set (planted)

(18)

Trespass quare clausum fretum (V²²)

If A being bound to repair a bridge cannot do it without going upon the land of B. A is justified in going upon B's land. and the same rule undoubtedly holds where a corporation or a town is obliged to build & repair a bridge -- It is indeed the privilege of the public but this justifies the trespass

5 Bac 179
to p. l.

The same rule

If on a navigable river A finds it necessary to go onto the land of the adjoining proprietor to tow up his boat. -- but now the rule is denied, such a privilege can be warranted only by special custom & such does not exist in Engl or in this country at present. The necessity is not here as great as in the next case which seems to make the difference --

1 Salk 725.
6 Mod 163
5 Bac 110. n. 1.
3 W R 253.
1 Burr 291

(19)

But it seems to be agreed that if a public highway is so out of repair that travellers cannot pass it travellers may pass over the land of the adjoining proprietor for the necessity of the thing -- but if the land of the adjoining proprietor is inclosed it is doubtful whether he may take down a fence probably he may. such is the practice, This rule does not hold of a private way. the public are not concerned & beside it is the duty of the grantor to repair --

Salk 725
Dor 716 717
3 S R 203
2 S L 36. Shows 28.
Comyn d 5
Sherrind d 5
1 Lev 234
Hou Dory 716.
2 S L 36 not law
Comyn d 5 not law
Sherrind 6.
Hou d. 5
Whithead

(10) Trespass quare clausum - for what injuries it lies

But one who has only a right of common cannot maintain this action against one who is injuring the herbage. It however he is disturbed in the enjoyment of his common he may have a special action ^{on} the case. This right is incorporeal - trespass therefore cannot lie - vide Trespass on the Case & Quare for remedy in case of disturbances.

(20)

Howd 70 The entering of another's house without permissio or lawful authority is strictly a trespass even tho' the door be open. but if one has been in the habit of entering without permission the acquiescence of the owner of the ~~same~~ of the house is construed into a license.

Howd 246 But if the owner of a house has unlawfully taken the goods of another into his house the owner of the goods may, the door being open enter for that purpose & taking the goods without permission and if the goods were stolen he may break the house to enable him to enter. The owner is the aggressor. This is analogous to the cases in pages 16 & 17 ante.

How far one may enter another's land or house to suppress an affray &c. vide false imprisonment & Shiff.

And for the purpose of executing process vide Shiff & jailors. for such purpose, the officer after he has demanded the body of the criminal, may, if the door is open.

5 Co 91. & deon 41 vide above f. 1. 2.

The entering of another's house for the purpose of executing a quid search warrant is not justifiable for such a warrant is utterly void "vide false imprisonment"

2 Wils 275

291.

Exp^t Dig 297Cant^t 409

1 Vent 31.

Julk 418.

A Sheriff may not in any case, to execute a comp civil process break open a house. This is called Br 6 90-9
The persons castle. Hob 52. Esp^t di 644.

Hob 52. Esp^t

di 644.

Bac abn 52.

Against whom the action lies.

This action will not lie ag^t lepor for life & lett 271 years for wrongfully cutting or cutting & carrying away timber because the lepor is not in possession 4 Co 62. Exp^t Dig 401. nor has a right of possession. Waste is not the lepor's remedy. This supposes the cutting & carrying away to be one continued action

But if after the timber is cut it is permitted to remain for a time & then takes away the timber trespass 4 Co 62. or trover will lie for carrying away the timber as a chattel but not trespass quare clausum fregit, for here the timber becomes a chattel & the lepor has constructive possession of the timber but there is no constructive possession of real estate

(25) Ag^t whom trespass quare clausum de lie,

If one leases land excepting the trees the lepa
ls att 57a may maintain trespass quare clausum propter ag^t the
Esp^d Dig 400. lepa for cutting the trees. (vide ante) 11-

ls att 57a Formally this action w^d lie by the lepa ag^t lepa
Esp^d Dig 400. at will for cutting timber, but now tenants at
1 Roll 580. will are tenants from year to year.
5 Co 13. b
bro & 784.

2 Pl 50 But the action will not lie ag^t tenant at sufferance
Esp^d Dig 400 until the lepa has reentered this wrongful act
does not determine the estate of the tenant
at sufferance until reentry,

Ld Ray 709 But if (at Sukra) the trees are reserved the trees
Esp^d Dig 400 are injured by the cattle of the lepa, the lepa
is not liable in any action. For the lepa
has the right to put his cattle on the
land & the damage is at the risk of
the lepa unless there are special covenants

(26)

4 Co 134 This action will lie ag^t a tenant at will or sufferance
Ld Ray 13. 110. of any age. This is true of all actions
5 Bac 134. of trespass - The intention has nothing to
Tresp 2. do with acts committed with force & arms

Every person concerned in the commission of a trespass are liable in this action. Aiding or abetting will make one a principal where the same acts or make one an accessory in case of felony. In trespass there are no accessories.

1 Ser 124

5 Bac 115.

4 Bl 36.

Saik 409

Bac tr 91.

If A agrees to a trespass committed for his benefit by B. he is liable tho' he neither requested it or aided or abetted. (agrees here means assents) Thus if A a master is present while B his servant is committing a trespass for A's benefit & does not prohibit the servant trespass will lie agt A for qui not prohibere cum prohibere possit jura -

5 Bac 115.

If several join in a trespass the party injured may sue them all in one action, or any number of them in one action, or one of them alone or each of them in separate actions.

8 Co 159

5 Bl 649

5 Bac 115.

Bac pl 11

c 13.

It is said by Bacon that if the action is brot agt one of several trespassers an action will not lie agt any of the other trespassers for the pendency of the first agt one he says is a good plea in abatement to the others but this is not law.

6 Co 115

Bac pl 11

5 Bl 649

5 Bac 115

11 John 290

He can however recover only one assessment of damages. only one satisfaction, yet he may sue each one in a separate action ut supra.

Bac 115

Yelv 67

Hob 66.

Capl Dig 115.

Bac ab 115

J. 2.

(27) Trespass quare clausum fecit.

Hence a recovery, ag^t one of several joint
bro 473. trespassers is a bar to an action ag^t any of
Hlv 674 the others & if several suits are depending
Esp^r Dist 116 at the same time ag^t several jt trespassers &
bro 30. judgt is recovered ag^t one the proceedings an
Bac Abr pt the others will be stayed & that judgment
H 4 13. 2nd q.

3 Count R This rule has been denied in Count. & see Yels
67 (a) - Subsequent recovery

5 Bac 187. It has been said that an acquittal of ^{one} of several
Abbrmes q. 1. joint trespassers is a bar to an action brought
ag^t one of the others. This never was law.
The acquittal cannot be rec^d in evidence

2 Roll 46 If A's cattle being kept as bailie by B. B is
2nd q. Dy 387 clearly liable if the cattle break into C's
5 Bac 158. q. 2. enclosure & according to some opinions B
Jenk 161. alone is liable. but of this latter part of the
rule I doubt.

Declaration in this action

When the trespass consists in the abuse of authority given by law where the deft is made trespasser by relation it is suff^t to state the trespass generally. Salk 221 Bull. 131 And if the Deft justifies by pleading the license of 35 R 292 law then the Plf sets facts in his replication the 15 R 474 subsequent fact whh makes him trespasser by relation. Esp^d Dig 405

The plf for the purpose of aggravating damages ^{may} state Stra 61 in his declaration wrongs for whh, alone he has no action

Salk 119 642

2 Burr 1114

Bro 1664

15 Co 130

Apparently Contra 10 Co 130.

It has been made a question whether the Plf can & back } declare in the same action & count for breaking his head & house & for beating his servants per quod servitium built 113. amitt. I G trusts that where the whole injury Esp^d Dig 407 complained of is one continued wrong both may be joined in one count. but if A broke the house on 2 Sel 642. one day & on the next day beat his servants both then 12 R 366. trespassers cannot be declared in one count & on principle 8 JR 133 they cannot be joined in one declaration because 1 Sam 346. ²² when the beating of the servant with a loss of service 2 Ray 1032 is a distinct offence it sounds only in case. but by 2 JR 166 precedent these offences may be joined in seff^t counts 2 East in the same declaration

(31) Declaration in trespass quare clausum.

But where the declaration complains of breaking
Salk 642. and entering the Plf's house & beating his servant
16d R 56. witht per good ser so the Pl cannot give in evidence
PDR 133. the loss of service for it is not alleged in the decla-
9 Co 113. ration. In this case the beating is laid
1 Saunders 246 merely for aggravation, & a distinct action
(a & b note 2) may afterwards be maintained for the injury,
2 East 154 done to the servants,

Co Litt 332 The day laid in the declaration is not material
Bro El 32 & this is the case in most instances of pleading a
Esp. Dig 407 day. if one declares for a tort or parol contract.
the day is never material. & indeed the party
is never material except where the day enters
into the description of the fact pleaded.

(32)
1 Leon 244. Where a trespass is committed by several the
5 Bac 193. if may declare where one alone is sued that
tr i 2. 1. the Deft alone committed &c or he may declare
that it was committed with another alone
who is unknown.

Harb 164. 149 But it is said that if in an action ag^t a
5 Bac 192. 3 the declaration states a trespass committed
1 Leon 244. by A & B that the declaration is ill for not
1 Saunders 291. joining B. but I think this clearly wrong.
Salk 32. for clearly one of several joint trespasses may
6 T R 766. 36. be sued alone. & if in an action ag^t one
it appears in evidence that another was engaged
(1. h. R 76) in the trespass the Plf may recover.

The wrong must be alleged to have been committed with force & arms & against the peace & by comm: law this defect was one whh could not be cured by verdict. they were at C L matter of substance—

1 Show. 28.
Salk 636 40
& Bac 11. 3. 1. 1.
Pleas 61.
Bentl 390.
66.—

Bac tr i. 1.

By 16 & 17 Car 2^o. If these words are omitted, after verdict they may be amended. & inserted.

Salk 636
Exp. Dig 408.
(2 Ray^o 985).

Still on guilt demur the declaration is ill.

The reason is that by the comm: law when one was convicted of forcible wrong a judgement was rendered as for a fine. but if the force & breach of peace did not appear on the face of the declaration such judg^t could not be rendered tr: i. l. & 24—

St 5 M^o & 11 W^o has taken away this judgement still it is necessary to keep up the distinction between trespass vi et armis & case for the purpose of letting in the provisions of this statute,

2 Ray 985. not correct

In Comm: there never was such a diversity of judgments in case & in force so that these words were never necessary here for the reason whh render them necessary at comm: law. & it was once decided (1796) that the words vi et armis might be considered good omitted & still the declaration be good. but the forms of actions ought to be preserved & our obs have determined that trespass vi et armis & case cannot be joined in one declaration. And I think that the English rule w^o now be adopted in Comm: by every prudent lawyer.

(35)

Declaration in trespass quare clausum.

The injury for which this action is brought must be specifically alleged & therefore if the Plf declares that the deft broke & entered the Plf's house et alia enormia fecit. under the latter words the Plf cannot prove that the Deft broke his furniture &c. because the breaking the furniture is a substantive ground of action, — and under alia enormia the Plf may prove circumstances which are not substantive grounds of action as threatening &c.

But this rule is dispensed with where the action arises ex turpi causa. for the sake of decency.

(36)

The Plf must state the value of the injury & in genl he ought to state quantity & the value & quantity sh^d be stated large enough for the Plf may he may recover less than he states can not recover more. — This rule is intended to furnish a prima facie rule of damages — Where it is apparent from the nature of the wrong that the quantity cannot be ascertained it need not be stated.

But the omission of the allegation of value is aided by verdict (it seems) for if the jury find a given sum for damages the verdict impliesly supplies by necessary intendment what the pleadings have omitted.

Where trespasses are of a permanent nature that is where they are such as may be continued from day to day & are thus continued all the trespasses ad Ray 240 thus renewed from day to day may be laid in Salk 635. the declaration continuando from the first Exp^d Dig 407- day of the trespass to the last. or he may Salk 635. trespass declare for each trespass separately in 2 Lilly's Entries 444 form. 1 Saund 234. n. 2 Chitty 5 Bac 197. Eyre 326. (38).

The principle is that it is impossible to distinguish each day's trespass. or at least very difficult & then for the law allows the Plf to state with a continuando. - Ex trespass for entering with cattle & injuring herbage. The injury of each day cannot easily be pointed out.

But where trespasses repeated day after day terminate ad Ray 239 each in itself & being once done cannot be continued 975 623 such trespass cannot be laid continuando. but they Exp^d Dig 407 may be laid as having been committed various 3 Bl 212. diebus et vicibus from such a day to such a day. Thus if one cuts down a timber tree to day & another tomorrow. this act terminates in 1 Saund 24. n. 1 1 Ch 253. q. Salk 635. q. itself & cannot be laid continuando.

And where trespasses are such as might be laid continuando it may be laid as having been committed diversis diebus & vicibus & the latter is the prevailing practice in Engl^d for this is always safe. The rule that a plea may lay a trespass with a continuando is nearly perpetuum.

1 Saund 24. n. 1

(39) Declaration in trespass quare clausum

If the Plf declares for several trespasses
2240. & one day only is laid in the declaration he
976:7. can prove only one day's trespass. tho' he may
talk 639. select w^h day he pleases.
Ep^d Dig 408.

There are two modes of laying a continuando
& either may be adopted for w^h see 5 Bac 197
Comyn Dig Tres b. 2. 2d Ray^o 240.

Bro E 152. Where the Plf has been ousted & reentered &
2d Ray^o 235. ousted again & reentered &c ad infinitum he
talk 638. may lay their ouster continuando or diversis
Co^p § 407.8. dictis & vicibus. or he may allege that
2d Ray 478. the Deft entered on a day certain &
continued in possession until &c —

Ep^d Dig 408. If a trespass w^h according to the above distinct^s
talk 639. cannot be laid with a continuando as so laid
5 Bac 199. the declaration is ill, but if some of the trespasses
1 Lev 219. w^h are laid with a continuando are properly
3 Lev 94. so laid & others not. the declaration is good
2d Ray 239. at least after verdict & I think good upon
1 Lev 219. demurrer. It is good after verdict ^{if the jury} give entire damages. so are the authorities but
quere. — now a declaration with a continuando
1 Hann 282. w^h is improperly so laid is good except on
2d Ray^o 240. special demurrer.

(46)

Defences in trespass q.c.

The genl issue in this action is, not guilty, as indeed in all other actions, sounding in tort. On the assault Exp^d Dig^o 411
When the defence consists in a justification or common Co Litt 282
law principles he must plead it specifically, for it is inconsistent
with the plea not guilty, the plea "not guilty" 1 Ed Reg^o 732
means that the Deft did not commit the acts Rich 254
complained of - Exp^d Dig^o 411

Under the st law of this state if it may be given Hulk 4
in under the genl issue but if justification is given in
evidence under the genl issue notice must have been
given to the opposite party. In this state this rule is
established by the sup^r court - If the Deft has a This provs that
lease for years from the Plf, the Deft may give the Deft has
th^y in evidence under the genl issue at all - not entered
on the Plf's
land

Accord & satisfaction is a good defence in this action q b 606 b
but accord alone is not in this or in any other Stras 3.
action. By accord is here meant a more verbal agreement, Doe place 19

This again must at comm^o law be specifically pleaded Exp^d Dig^o 415.
& under our statute the same rule as at common law.

Retard is a good defence & this must be bro E 66
specifically pleaded. It admits the performance Exp^d Dig^o 415.
of the acts complained of - & avoids them.
Release is a good plea. This must be specifically dalt 222
pleaded both at com^o law and under our Stat. H 6104
If Deft pleads release he must traverse that he 1 Ed Reg^o 229
has not committed a trespass subseq^t to the release
or he may plead not guilty as to any trespass
after such a time & as to trespasses before that time
a release. & this latter is the more simple -

(41)
Defence, in trespass & assumpsit

If an action is brought ag^t two or more t^r trespassers a release to one is a release to all
Hobbs 232 who are guilty of the wrong. for each is
5 Co 97 liable for the whole & a discharge of any
Eldridge 415 one is a discharge of what that one is
Hobbs 377 liable for wh^{ch} is the whole—

It was formerly held that if a Pl^f in an
4 Co 670 action ag^t several trespassers entered a not pros
pro 124 as to one that it was a release to the others
Eldridge 415 but it was held that if damages were assayed
ag^t one & then not pros was entered as to another
that the not pros did not discharge the one
& if no damages are assayed

Daunt 209 But the rule is now altered. & a not pros
Carth 19. in no case discharges the other trespassers

1 Mil 90

bro Car 239

242

21 Jac 1st enacts that the def^t. may plead in
Stra 549. bar a disclaimer alleging a tender of a sum
Calc 386 certain as suff^t damages & that the trespass was involun-
Eldridge 415 tary. This extends only to involuntary trespasses,
& the jury must find that the tender was suff^t but
at comm. law this is not so. Such a plea
at C L w^d am^t to nothing
we have no such notion of shall.

The act of limitation is a good defence &
2 V D 411 in Engl^d it must be specially pleaded. (On act
of limitation is three years. to this action) now
it may be given in evidence under the gen^l issue.
That is the Def^t objects to testimony of
a trespass committed before he

Evidence in trespass (42)

But title in this action cannot be specially
pleaded unless by giving colour to the Def. because *3 Wils 309*
unless it give colour to the Def. this plea amounts 1060 90 1
to the genl issue, and a special plea amounting 482 102
to the genl issue is inadmissible. If then Def. Pleas Spec
pleads title specially witht giving colour 5 Burr 268. 9
his plea is bad (& will be set aside on motion *am 5.*
In a sh? Plf demur). 126. 150.

In this state title is specially pleadable by Stat.
& the stat provides that when title is pleaded
before a single magistrate he must record the
plea & recognize the Def. to carry up the
record to the county Ct & he must use the
same plea in the County Court. & if the Def.
does not thus carry up the record he forfeits his
recognizance & if he does & fails in his plea he is
liable for treble damages & costs. A single
magistrate may try the question of title
when it comes up under the genl issue —

The evidence in this as in other actions follows. *2 Bull 465*
the issue any evidence ^{in the issue} going to the merits *Exp. Dig 41-*
but not embraced by the plea is inadmissible *3 Burr 1355.*

But under the allegation alia enormia the Plf *Exp. Dig 47*
^{in aggravation} may give in evidence upon the genl issue any *2 Burr 114.*
thing whh will not in itself support an action *1 Old 225.*
in his favour, but not of any fact whh will
itself support an action of trespass in his
favour. *(ante 31.)*

Evidence in trespass quare clausum,
(43.) Where the Plf sets out the abuttals of his
Vch. 114 close he must prove the land to be substantially
exactly bounded as he describes.
2 Roll 677

1 Saunders 242. 1. Where the Plf lays trespass with a continuance
1641 258. 9 he must prove trespass within the period laid
for where the trespass is thus laid the time is
supposed to enter into the description - in the
ordinary case the day is mere matter of form

Ball 16. But he may wave the continuance & confine himself
Exp. Dig. 417. 8. in evidence to a trespass committed on some one
day, & then he may take any day either before a
after the time laid in the declaration - (ante 38. 9)

Exp. Dig. 418. If Plf lays a trespass from one day to another together
ante 7. 9. with an ouster he must then prove a reentry before
action brought or he can recover only for one day's
trespass.

Vch. 114. 8. If the Deft justifies & proves enough to entitle him to
Exp. Dig. 418. justification it is suff. tho' he does not prove all that
he alleges.

For the subject of serving damages vide "assault & battery"
and also Exp. Dig. 420.

(1.)

Fraudulent Conveyances (No. 1.)

§ 3623 all conveyances ^{made} void such as agreements & contracts intended to defraud the creditors Rob 273 n
of the grantor are as ag^t those only who are intended to be defrauded & their representatives, void.

Our Stat in Conn is similar,

There is a proviso in this statute that it shall not extend to any conveyance made to a bona fide purchaser, ^{for value} having no notice of the fraud. i.e. the fraudulent intention of the debtor will not make a conveyance to an honest purchaser void. Rob 477. H (b)

And this proviso extends to a conveyance from a fraudulent purchaser to a bona fide purchaser for value from the fraudulent purchaser. (post)

We have a similar statute but no such proviso. It comes and the proviso does not affect the construction of the Statute. It was made out of abundant caution.

The St 27 Eng enact that all conveyances made to defraud a bona fide purchaser shall be void as against such bona fide purchaser. The St contemplates such a case as this. If A sells his land secretly to B. & that A shall afterwards convey the land to C. for the purpose of defrauding B. who knows nothing of the former purchase by B. this conveyance to B is void as ag^t C. -

We have no such statute as the 27th Eng. & do not need such a one as will appear hereafter.

(21)

Fraudulent The rules applying to one of these st^s apply in genl to Conveyance, both.

Bray 434 Both of them st^s are in affirmance of the common law
3. 2546. Roberts says that to render such a conveyance void at
Robt 27.80 com: law the fraud must be positively proved but I trust
116.526.573. that the proof must be the same at com: law & under the st.
36053. It was formerly held indeed that these stat^s were in
Corbett 290 atb affirmance of the com: law only so far as to protect
bro 2444. a prior creditor.

Bac ab 192 But this doctrine has been long exploded &
138.6490 it has been settled that a conveyance to defraud creditors
111th 94. is void as well ag^t subseq^t creditors as ag^t prior creditors
2 206.600. by the common law, as well as under the Stat:
Fall 664. And under the 27. Elis. there is hardly a
Comy Dig. case supposable in which the bona fide conveyance
cor. b. 2. is not subseq^t to the fraudulent conveyance.
4 Day 284. Robt 17-20. 194. 5. 1 Root 324.

66072. But such conveyances are valid indeed as between
311m 222. the parties themselves. both at com: law & by the
bro 270. express words of the Stat:
bro 445.
Robt 33.641. 657. 1 Root 104. 489.

The com: law is not indeed sufficient.

56060. And a conveyance within the 27 Elis is void as
Bray 711. ag^t a subseq^t purchaser even if he knew of the
2 Br 61148. prior conveyance. now where actual fraud was intended
9 East 59. 74 in the prior conveyance the rule is proper but where
1. NR 335. the only objection is that the prior conveyance is
4 br 375 voluntary the rule is harsh. but the rule is well
1 Far 271 established. — The st & c l go on the supposi-
R. 16. 17. tion that the subseq^t purchaser is deceived & w^d
be defrauded if the first were not set aside,
convey
12 John 2. 536. 1 John Ch Rep 536 1 S.C.

And in equity a subseqt purchaser for value under fraudulent
an extortn agree having notice of a prior conveyance Conveyances,
with value can not hold tho if the subseqt purchaser Rob 233-4
 had an actual conveyance even in equity he will 507 n.
 hold. - But in the first case he has clearly 2 B 614-9
 no equity & therefore will be left to his remedy
 on the extortn agreem^t at law.

Fraudulent conveyances are in fact almost always 212310.
voluntary but they are not necessarily so. for if 2046320.
 a debtor makes a conveyance of land for its full 360816
value but both privy to the fraudulent intent 2046481
 the bro will hold in preference to the fraudulent Rob 23-7.491.
purchaser. & so will a subseqt bona fide 57778.
purchaser for value,

And the same rule holds of a judg^t Rob 490
 suffered by collusion where actual value is
given -

In some cases arising under these st^s the fraud
 is actual. i.e. that there is a fraudulent intent.

In other the fraud is constructive, tho a voluntary
 conveyance tho no fraud is intended is frequently
 deemed in law to be fraudulent - i.e. it is
constructively fraudulent.

And even where the fraud is actual it need not Rob 35.
 be proved that the br or purchaser sh^d be actually
deceived. it is suff^t that the conveyance was with
fraudulent intent - such at least is the rule
 established in the books.

(4.)

Fraudulent Conveyance,

This intent to deceive may be inferred from various facts which are called badges of fraud.
4 Bro 374 One of the most common facts from which the intent of fraud is rendered probable is that the conveyance was voluntary. & the fact that the first conveyance was without value & that there was a second conveyance with value, is suff evidence that the first conveyance was fraudulent,
1 Eq. ca 334.
Lim 6258.
Comp 280.
2 B. & L. 148.
R. 1633-5.

It was formerly thought that if a conveyance was made to defraud a particular creditor that that creditor only could take advantage of the fraud.
Rob. 417
1 Co. 93. b. but this rule is now exploded. & such conveyance defrauds no one of the creditors. — The St evidently means that the conveyance shall be void as to all standing in the situation of the C. intended to be defrauded.
Palmer 418.
Rob. 553. b. 60.
2 Bro 165. f. c. Under the St 13 Eliz. the fact that the grantor was indebted at the time of conveyance is a badge of fraud. but this is no badge of fraud under the 27th Eliz. — If A then embarrassed with debt conveys his land to B. & then to D. the fact of embarrassment is no evidence of fraud in favour of D.
Rob. 53. 9. 60.
Comp 711.

(5.)

It has been a great question whether the want of valuable consideration is only a badge of fraud or whether the want of such consideration per se makes the conveyance void
1 Ler 150237
193.
2 Ler 105.
1 Colled 119.
1 Keb. 486.
2 Vern 444.

That the voluntary conveyance is per se void as to the
Comp 434. 705
12 B. 13. 15. 16. 61.
60. 395.
9 East 59. 65. One in 6 L. 13. 2 Ves 10. 2 Vern 261. 2 Bl 1019.
1 Eq. ca 234. Rob 194. 204. 826. 628

According to the first class of authorities it is held Fraudulent
 that the fact that the conveyance is voluntary is only evidence of fraud under both 27th & 40th Eliz. Conveyance

But according to the latter class the want of sale consideration is under the 27th Eliz. conclusive evidence of fraud independently of any intention. & the 6th pronounces it void as matter of law. but none of these descriptions go to the 13th Eliz. - The case of Doe & Manning has settled this question, thus - If a man makes a gift of his property & then sells it for value the subject purchaser will hold as matter of law.

The question then arises whether a conveyance of property without value is fraudulent as against creditors or is per se fraudulent as matter of law.

1 Atk 15.

2 Ves 10.

3 Atk 442

2 Vern 327.

Fon 6258.

2 Bro 17. 61. 190.

4 Bro 388. 393.

395.

10 Atk 44.

Call 10057

57. C 324.

20670. 20570.

444. 442. 544.

Tail 65.

16 Com 630.

9 Atk 390.

11. Mass 44

3 John 454

The better opinion is that a want of consideration as against creditors is only presumption of fraud for it has been repeatedly decided that a reasonable family settlement by way of advancement is good as against creditors if the grantor was not embarrassed with debt at the time of making the conveyance and if there was no proof of actual fraud. & no particular marks of prospective contrivance -

This doctrine has been acknowledged in Court & in Mass. but denied in N. York,

Fraudulent Conveyances The case in B. & L. 200 goes to a great extent, in that case it was held that a reasonable family settlement made by a man not embarrassed (but indebted in a small sum) was void as ag^t subseq^t creditors but this neither appears to be justice or law.

2 Atk 152 The case of family settlement is not only one in 2 Vern 471. where the conveyance with value is good. If a Rob. 4513 conveyance is to a stranger with value such convey 1 Br 6434. ance will never be good ag^t creditors. - These family Rob 452. settlements are supported by good consid^r.

9 Maf 590. What is meant by the word 'indebted' in these rules? 11 Maf 421. it clearly means 'embarrassed with debt'. It can 16 Aust 2325. be no evidence of fraud that a man B. & L. 200. owes small debts & if they are it might ag^t creditors will be s^d that such settlements are always void ag^t Sugd 434. Marriage is always regarded as a valuable 4 Br 2438. consideration & cannot be set aside by subseq^t 393. purchasers or by creditors. -

Rob. 1035200.

523.

2 Bl 60297

4 Br 383.

conveyances in consideration of marriage are not entitled to the benefit of the 2^d ag^t a prior fraudulent 77. conveyance - This conveyance is treated in almost 4 Br 398. every respect as a conveyance founded on Rob. 105113. pecuniary consideration -

567. 50213.

1 Bl 784

7 Co 396

4. 112132.

10 Col 2132

2 Maf 175. 50

Rob 118. 457

464.

But according to some opinions there is a diff in one respect between marriage & other valuable considerations if a conveyance is made to a B & L for a pecuniary consideration i.e. from A only. a B & L are entitled to the benefit of the consideration but if in consideration of marriage a conveyance is made to A & his issue remainder to collateral relations, then latter are not protected by the consid^r

To the contrary opinion there are many authorities 4 Br 398
 viz that the collaterals are protected by the consid^d 2 Lev 105
 of marriage. 4 And 395. Counp 711. - Deed 21. 21 Apr 175

The party making the settlement has 4 Cr 319.
 not as in the other case rec^d an equivalent
 for the land - whh will be a fund for the
 paymt of debts.

But a settlement made after marriage & in considat Counp 257
 ion of a prior marriage it is always considered as a 2 Br 66 1748
 voluntary conveyance this therefore will in genl be Rob 187 253
 fraudulent under the 27th Eliz. but such settlements 2 Ves 10
 where the party making them was not involved in 2 sett 320.
 debt at the time of the settlement have been Rob 18. 24. 187
 protected under the 13 Eliz. 191. 228.
 21 Apr 175

But if the party making the settlement was
 embarrassed at the time the settlement will be
 void under the 13 Eliz.

8. It may be remarked that bona fide purchasers Rob 395. b. 16:7
 are more favoured than bona fide creditors in 187. 194.
 the construction of their statutes. 2 Km 317.
 for bona fide purchasers who are entitled to the 564.
 benefit of 27 Eliz advance their money for the
 specific thing itself which has been previously
 conveyed voluntarily, or fraudulently, but the
 creditor advances his money on the personal
 responsibility of the debtor. - The case is analogous
 to a mortgage & a genl creditor. Bond 2234

(9) Fraudulent Conveyance - Marriage Settlements

C But a settlement tho made after marriage of
1 Exch 354 made in pursuance of an agreement made before
3 Keb 6. marriage is not considered as voluntary & is
1 Vent 193. supported under both Statutes. - This however
2 Keb 700 is a rule of Equity only. - The original agreement
Rob 218 243 was in considⁿ of a future marriage & therefore
1 Stra 237. good - & this considⁿ extends to the subseq^t settlement.
2 Amb 288. It however the settlement made after marriage
2 Ker 146. varies considerably from the agreement it will be
1 Vern 288. supported only so far as it conforms with the
Rob 245. original agreement made before marriage -

2 Ker 248. And the settlement made after marriage will
1 Ves 196. be supported under these statutes if made in
2 Ves 304. pursuance of a parol agreement made before
1 Stra 236 788. marriage. for the st of frauds extends only
Rob 220. to the parties to a parol agreement & has no
concern with the tr^s & bona fide purchasers
The party to the contract may waive the
benefit of it. & strangers cannot object.

Talb 69. But if the settlement is not actually executed after
Rob 251. marriage & if there is nothing more than an
2 Ves 304:9. ex^ory agreement made before marriage Equity will
1 Purn 622. not enforce this ex^ory agreement as ag^t bona
Rob 227. fide purchasers with notice but will enforce it
as ag^t the cred^{ors} of the settlor. for the tr^s have
no claim on the land but the wife & issue have
a specific claim. - But between the wife &c
& bona fide purchasers the equity is equal
& the latter has the legal title

(11)

Marriage Settlements. Fraudulent Conveyances

A settlement made after marriage even with
any agreement made before marriage & with valuable
consideration will be supported as subject to debts 2 Ves 10.
if the settlement is reasonable or if there are Robt. 24.
any badges of fraud, as being embarrassed with 187, 171, 227
debt to.

There are many cases falling within the genl
rule that, are modified by particular circum-
stances.

(12) A settlement tho' made after marriage &
not in pursuance of a previous agreement if founded
on new & valuable consideration will be supported under the St's 27 & 13 Eliz. Price 61222

Thus if a portion accrues to the wife & the hus. in consideration of the portion made a settlement. this settlement will be good in equity. For here is an actual valuable consideration, This is too precisely what equity w^d. in genl compel him to do. 2 Atk 417
see in Ch 125
2 Ler 146.
Falch 64.
1 Atk 6.
2 Atk 477
Robt 242:3:4
252:3 262-72

So if the portion is given by wife's friend,
so if the settlement is in considⁿ of an agreement
to give a portion Amb 6121
(Ch)

(13)
Fraudulent Marriage Settlements

Conveyance When the hus. is obliged to apply to a Ct of equity to obtain the wife's property & is obliged to make a reasonable settlement by that Court as a condition of that Court's decreeing in his favour the settlement will stand both under the 13 & 27 Eliz. The settlement is the means by which he purchases the enjoyment of the wife's property - It is done under sanction of a Ct. And the same w^d be the case if the trustee refuses to deliver the wife's property unless the husband will make a settlement on the wife & the husband makes such a settlement & it be reasonable the settlement will be good under both Statutes. For 1st Equity w^d have compelled the settlement to be made & 2nd he thus purchases the enjoyment of the wife's property.

And yet in this very case if the trustee had voluntarily delivered up the wife's property & then the husband sh^d voluntarily make a reasonable settlement this settlement will be void as ag^t bona fide purchasers but still good ag^t subseq^t creditors if the husb^d is not involved in debt &c,

But if the trustee sh^d require a settlement exceeding what a Ct of eq. considers as reasonable it will be void quoad the excep. & void quoad the excep. in favour of creditors.

What is reasonable must be determined by the discretion of the Chancellor.

These rules relating to trustees apply equally
to an executor as such, as if her father's executor
for the ex'r is always a trustee - & If the
wife is entitled to a legacy under a will
& the ex'r insists on a settlement - for a
legacy is not recoverable in a Court of
Law.

Str 239

2 Ves 18.

2 Atk 420.

Preced 6548.

3 P W 11

Rob 285. 8.

If the wife has an equitable title to a chattel
real the hus. may dispose of it free from any
condition imposed upon him in law or in Equity
for he has the legal title to her chattels real

1 Vern 7. 18.

2 Vern 270.

2 P W 722.

4 Ves 353.

Hence if a chattel real is held by a trustee
& he refuses to deliver it up with a settlement
and a settlement is made by the hus. in pursuance
of the condition this settlement is voluntary
and will not be supported under the Statutes.

Rob 299. 662.

3 P W 212

It is not very easy to see any reason for
this rule. But it seems clear from the authorities
that Equity will never impose terms on a hus.
when he comes into that C^t for a chattel
real of the wife.

(16.)

And these are some cases in all dispositions of
property by a feme sole will be fraudulent & void
as ag^t her subvj^t husband. in equity & in eq^y only
these rules are in equity founded on principles purely
equitable & not on the Statutes.

2 P W 357

Rob 341-55

(17)

1st If a woman before any treaty of marriage reserves an exclusive dominion over her property with a good view to a future marriage, if the husband makes no settlement on the wife, he cannot set the conveyance aside even tho' the husband had no notice of the conveyance.

2 Br 62345 But if the conveyance were made pending a treaty of marriage & in contemplation of a marriage with a particular person afterwards married. If he has no notice of the conveyance it will be void as against him even tho' he made no settlement on the wife.

(17)
2 Br 11533 L: If the husband has made an adequate settlement on the wife he may be relieved in the case first supposed against this conveyance on the ground of fraud inferable from his want of notice.

3^d If a woman in contemplation of marriage & pending a treaty makes a conveyance for the support of ^{her} children of a prior marriage. this conveyance will be good even tho' the husband has no notice.

1 Feb 659

20m:557

21m:408.

12th 265.

bom: 705.

Rob 359.

And this rule holds tho' the hus. has made a settlement on the wife. for it is a moral duty for her to provide for her children.

And such a conveyance too has been held good as to creditors & bona fide purchasers but since the case in last it may be questioned whether it would be good as to purchasers.

12th 268.

21m:557

21m:408.

12th 265.

bom: 705.

Rob 359.

4th If a husband has made a settlement with his wife induced by an intentional concealment of the conveyance to the children & by holding out false appearances. the settlement on the children is void.

(18.)

21m:533.

Rob 356:7.

360.

21m:442.

for here is a positive fraud

I think it w^d be more equitable in this case to set aside the settlement made by the hus to the wife.

(19).

To justify a C of equity in setting aside
2 Br 62350 any conveyance by the wife, then must, in
Rob 357.7 genl, be actual fraud.

1 Fonb 259. n. 3rd If a woman, on the eve of marriage,
2 Ves 264. makes a conveyance (voluntary) to a stranger,
Ab 352. the husband, if he had no notice, may clearly
set the conveyance aside, whether there is
any fraud or not.

3 Pym 74. And then are cases on the other hand in which
65. a wife has been released of clandestine agree.
In re 64/31 made by the husband in disappointment
Rob 350. n. of her expectations (vide "power of Chancery")
1 Ves. 136.

Who can take advantage of fraudulent conveyances
3 Co 81. The great answer is no other than a bona fide
Gomp 705. n. purchaser can take advantage of 27th Ellis
Tal 664. If then A makes a fraudulent conveyance to
3 Nels 356. B & afterwards makes another fraudulent conveyance
1 Barr 396. to C. C cannot avoid the former. - the rule wd be
Rob 369. 382. 8. the same was they only constructively fraudulent
425. 6. 641. 658. in voluntary.

And a purchaser under a family settlement made in consideration of natural affection & only cannot see 360536. aside a prior voluntary conveyance tho' made to a stranger. for tho' the latter are bona fide purchasers Rob 370:1. yet they are so with value. 641. 33.

The same rule holds in case of a jointure settled upon a married woman after marriage. if made before marriage the rule w^d be diff.

But where one purchases for valuable consideration mere inadequacy of price will not prevent him from availing himself of a prior voluntary conveyance. 66571 Comp 705:10.

But gross inadequateness of price amounting only to a colourable consideration is an objection to taking advantage of the Stat 2 Ann 618. Comp 713:4. Rob 373.

360520

605445

60572

And if a subsequent purchaser for value & with an inadequate price appears to have overreached the grantor in the transaction he cannot set aside a prior voluntary conveyance.

2 Jan 272

605713

605259

60573.

the 27th ^{rule} extends to a bona fide mortgage who is by the Stat unable to set aside a prior voluntary conveyance. ~~See 4th 5th 6th 7th 8th 9th 10th 11th 12th 13th 14th 15th 16th 17th 18th 19th 20th 21st 22nd 23rd 24th 25th 26th 27th 28th 29th 30th 31st 32nd 33rd 34th 35th 36th 37th 38th 39th 40th 41st 42nd 43rd 44th 45th 46th 47th 48th 49th 50th 51st 52nd 53rd 54th 55th 56th 57th 58th 59th 60th 61st 62nd 63rd 64th 65th 66th 67th 68th 69th 70th 71st 72nd 73rd 74th 75th 76th 77th 78th 79th 80th 81st 82nd 83rd 84th 85th 86th 87th 88th 89th 90th 91st 92nd 93rd 94th 95th 96th 97th 98th 99th 100th 101st 102nd 103rd 104th 105th 106th 107th 108th 109th 110th 111th 112th 113th 114th 115th 116th 117th 118th 119th 120th 121st 122nd 123rd 124th 125th 126th 127th 128th 129th 130th 131st 132nd 133rd 134th 135th 136th 137th 138th 139th 140th 141st 142nd 143rd 144th 145th 146th 147th 148th 149th 150th 151st 152nd 153rd 154th 155th 156th 157th 158th 159th 160th 161st 162nd 163rd 164th 165th 166th 167th 168th 169th 170th 171st 172nd 173rd 174th 175th 176th 177th 178th 179th 180th 181st 182nd 183rd 184th 185th 186th 187th 188th 189th 190th 191st 192nd 193rd 194th 195th 196th 197th 198th 199th 200th 201st 202nd 203rd 204th 205th 206th 207th 208th 209th 210th 211st 212nd 213th 214th 215th 216th 217th 218th 219th 220th 221st 222nd 223rd 224th 225th 226th 227th 228th 229th 230th 231st 232nd 233rd 234th 235th 236th 237th 238th 239th 240th 241st 242nd 243rd 244th 245th 246th 247th 248th 249th 250th 251st 252nd 253rd 254th 255th 256th 257th 258th 259th 260th 261st 262nd 263rd 264th 265th 266th 267th 268th 269th 270th 271st 272nd 273rd 274th 275th 276th 277th 278th 279th 280th 281st 282nd 283rd 284th 285th 286th 287th 288th 289th 290th 291st 292nd 293rd 294th 295th 296th 297th 298th 299th 300th 301st 302nd 303rd 304th 305th 306th 307th 308th 309th 310th 311st 312nd 313th 314th 315th 316th 317th 318th 319th 320th 321st 322nd 323rd 324th 325th 326th 327th 328th 329th 330th 331st 332nd 333rd 334th 335th 336th 337th 338th 339th 340th 341st 342nd 343rd 344th 345th 346th 347th 348th 349th 350th 351st 352nd 353rd 354th 355th 356th 357th 358th 359th 360th 361st 362nd 363rd 364th 365th 366th 367th 368th 369th 370th 371st 372nd 373rd 374th 375th 376th 377th 378th 379th 380th 381st 382nd 383rd 384th 385th 386th 387th 388th 389th 390th 391st 392nd 393rd 394th 395th 396th 397th 398th 399th 400th 401st 402nd 403rd 404th 405th 406th 407th 408th 409th 410th 411st 412nd 413th 414th 415th 416th 417th 418th 419th 420th 421st 422nd 423rd 424th 425th 426th 427th 428th 429th 430th 431st 432nd 433rd 434th 435th 436th 437th 438th 439th 440th 441st 442nd 443rd 444th 445th 446th 447th 448th 449th 450th 451st 452nd 453rd 454th 455th 456th 457th 458th 459th 460th 461st 462nd 463rd 464th 465th 466th 467th 468th 469th 470th 471st 472nd 473rd 474th 475th 476th 477th 478th 479th 480th 481st 482nd 483rd 484th 485th 486th 487th 488th 489th 490th 491st 492nd 493rd 494th 495th 496th 497th 498th 499th 500th 501st 502nd 503rd 504th 505th 506th 507th 508th 509th 510th 511st 512nd 513th 514th 515th 516th 517th 518th 519th 520th 521st 522nd 523rd 524th 525th 526th 527th 528th 529th 530th 531st 532nd 533rd 534th 535th 536th 537th 538th 539th 540th 541st 542nd 543rd 544th 545th 546th 547th 548th 549th 550th 551st 552nd 553rd 554th 555th 556th 557th 558th 559th 560th 561st 562nd 563rd 564th 565th 566th 567th 568th 569th 570th 571st 572nd 573rd 574th 575th 576th 577th 578th 579th 580th 581st 582nd 583rd 584th 585th 586th 587th 588th 589th 590th 591st 592nd 593rd 594th 595th 596th 597th 598th 599th 600th 601st 602nd 603rd 604th 605th 606th 607th 608th 609th 610th 611st 612nd 613th 614th 615th 616th 617th 618th 619th 620th 621st 622nd 623rd 624th 625th 626th 627th 628th 629th 630th 631st 632nd 633rd 634th 635th 636th 637th 638th 639th 640th 641st 642nd 643rd 644th 645th 646th 647th 648th 649th 650th 651st 652nd 653rd 654th 655th 656th 657th 658th 659th 660th 661st 662nd 663rd 664th 665th 666th 667th 668th 669th 670th 671st 672nd 673rd 674th 675th 676th 677th 678th 679th 680th 681st 682nd 683rd 684th 685th 686th 687th 688th 689th 690th 691st 692nd 693rd 694th 695th 696th 697th 698th 699th 700th 701st 702nd 703rd 704th 705th 706th 707th 708th 709th 710th 711st 712nd 713th 714th 715th 716th 717th 718th 719th 720th 721st 722nd 723rd 724th 725th 726th 727th 728th 729th 730th 731st 732nd 733rd 734th 735th 736th 737th 738th 739th 740th 741st 742nd 743rd 744th 745th 746th 747th 748th 749th 750th 751st 752nd 753rd 754th 755th 756th 757th 758th 759th 760th 761st 762nd 763rd 764th 765th 766th 767th 768th 769th 770th 771st 772nd 773rd 774th 775th 776th 777th 778th 779th 780th 781st 782nd 783rd 784th 785th 786th 787th 788th 789th 790th 791st 792nd 793rd 794th 795th 796th 797th 798th 799th 800th 801st 802nd 803rd 804th 805th 806th 807th 808th 809th 810th 811st 812nd 813th 814th 815th 816th 817th 818th 819th 820th 821st 822nd 823rd 824th 825th 826th 827th 828th 829th 830th 831st 832nd 833rd 834th 835th 836th 837th 838th 839th 840th 841st 842nd 843rd 844th 845th 846th 847th 848th 849th 850th 851st 852nd 853rd 854th 855th 856th 857th 858th 859th 860th 861st 862nd 863rd 864th 865th 866th 867th 868th 869th 870th 871st 872nd 873rd 874th 875th 876th 877th 878th 879th 880th 881st 882nd 883rd 884th 885th 886th 887th 888th 889th 890th 891st 892nd 893rd 894th 895th 896th 897th 898th 899th 900th 901st 902nd 903rd 904th 905th 906th 907th 908th 909th 910th 911st 912nd 913th 914th 915th 916th 917th 918th 919th 920th 921st 922nd 923rd 924th 925th 926th 927th 928th 929th 930th 931st 932nd 933rd 934th 935th 936th 937th 938th 939th 940th 941st 942nd 943rd 944th 945th 946th 947th 948th 949th 950th 951st 952nd 953rd 954th 955th 956th 957th 958th 959th 960th 961st 962nd 963rd 964th 965th 966th 967th 968th 969th 970th 971st 972nd 973rd 974th 975th 976th 977th 978th 979th 980th 981st 982nd 983rd 984th 985th 986th 987th 988th 989th 990th 991st 992nd 993rd 994th 995th 996th 997th 998th 999th 1000th 1001st 1002nd 1003rd 1004th 1005th 1006th 1007th 1008th 1009th 1010th 1011st 1012nd 1013th 1014th 1015th 1016th 1017th 1018th 1019th 1020th 1021st 1022nd 1023rd 1024th 1025th 1026th 1027th 1028th 1029th 1030th 1031st 1032nd 1033rd 1034th 1035th 1036th 1037th 1038th 1039th 1040th 1041st 1042nd 1043rd 1044th 1045th 1046th 1047th 1048th 1049th 1050th 1051st 1052nd 1053rd 1054th 1055th 1056th 1057th 1058th 1059th 1060th 1061st 1062nd 1063rd 1064th 1065th 1066th 1067th 1068th 1069th 1070th 1071st 1072nd 1073rd 1074th 1075th 1076th 1077th 1078th 1079th 1080th 1081st 1082nd 1083rd 1084th 1085th 1086th 1087th 1088th 1089th 1090th 1091st 1092nd 1093rd 1094th 1095th 1096th 1097th 1098th 1099th 1100th 1101st 1102nd 1103rd 1104th 1105th 1106th 1107th 1108th 1109th 1110th 1111st 1112nd 1113th 1114th 1115th 1116th 1117th 1118th 1119th 1120th 1121st 1122nd 1123rd 1124th 1125th 1126th 1127th 1128th 1129th 1130th 1131st 1132nd 1133rd 1134th 1135th 1136th 1137th 1138th 1139th 1140th 1141st 1142nd 1143rd 1144th 1145th 1146th 1147th 1148th 1149th 1150th 1151st 1152nd 1153rd 1154th 1155th 1156th 1157th 1158th 1159th 1160th 1161st 1162nd 1163rd 1164th 1165th 1166th 1167th 1168th 1169th 1170th 1171st 1172nd 1173rd 1174th 1175th 1176th 1177th 1178th 1179th 1180th 1181st 1182nd 1183rd 1184th 1185th 1186th 1187th 1188th 1189th 1190th 1191st 1192nd 1193rd 1194th 1195th 1196th 1197th 1198th 1199th 1200th 1201st 1202nd 1203rd 1204th 1205th 1206th 1207th 1208th 1209th 1210th 1211st 1212nd 1213th 1214th 1215th 1216th 1217th 1218th 1219th 1220th 1221st 1222nd 1223rd 1224th 1225th 1226th 1227th 1228th 1229th 1230th 1231st 1232nd 1233rd 1234th 1235th 1236th 1237th 1238th 1239th 1240th 1241st 1242nd 1243rd 1244th 1245th 1246th 1247th 1248th 1249th 1250th 1251st 1252nd 1253rd 1254th 1255th 1256th 1257th 1258th 1259th 1260th 1261st 1262nd 1263rd 1264th 1265th 1266th 1267th 1268th 1269th 1270th 1271st 1272nd 1273rd 1274th 1275th 1276th 1277th 1278th 1279th 1280th 1281st 1282nd 1283rd 1284th 1285th 1286th 1287th 1288th 1289th 1290th 1291st 1292nd 1293rd 1294th 1295th 1296th 1297th 1298th 1299th 1300th 1301st 1302nd 1303rd 1304th 1305th 1306th 1307th 1308th 1309th 1310th 1311st 1312nd 1313th 1314th 1315th 1316th 1317th 1318th 1319th 1320th 1321st 1322nd 1323rd 1324th 1325th 1326th 1327th 1328th 1329th 1330th 1331st 1332nd 1333rd 1334th 1335th 1336th 1337th 1338th 1339th 1340th 1341st 1342nd 1343rd 1344th 1345th 1346th 1347th 1348th 1349th 1350th 1351st 1352nd 1353rd 1354th 1355th 1356th 1357th 1358th 1359th 1360th 1361st 1362nd 1363rd 1364th 1365th 1366th 1367th 1368th 1369th 1370th 1371st 1372nd 1373rd 1374th 1375th 1376th 1377th 1378th 1379th 1380th 1381st 1382nd 1383rd 1384th 1385th 1386th 1387th 1388th 1389th 1390th 1391st 1392nd 1393rd 1394th 1395th 1396th 1397th 1398th 1399th 1400th 1401st 1402nd 1403rd 1404th 1405th 1406th 1407th 1408th 1409th 1410th 1411st 1412nd 1413th 1414th 1415th 1416th 1417th 1418th 1419th 1420th 1421st 1422nd 1423rd 1424th 1425th 1426th 1427th 1428th 1429th 1430th 1431st 1432nd 1433rd 1434th 1435th 1436th 1437th 1438th 1439th 1440th 1441st 1442nd 1443rd 1444th 1445th 1446th 1447th 1448th 1449th 1450th 1451st 1452nd 1453rd 1454th 1455th 1456th 1457th 1458th 1459th 1460th 1461st 1462nd 1463rd 1464th 1465th 1466th 1467th 1468th 1469th 1470th 1471st 1472nd 1473rd 1474th 1475th 1476th 1477th 1478th 1479th 1480th 1481st 1482nd 1483rd 1484th 1485th 1486th 1487th 1488th 1489th 1490th 1491st 1492nd 1493rd 1494th 1495th 1496th 1497th 1498th 1499th 1500th 1501st 1502nd 1503rd 1504th 1505th 1506th 1507th 1508th 1509th 1510th 1511st 1512nd 1513th 1514th 1515th 1516th 1517th 1518th 1519th 1520th 1521st 1522nd 1523rd 1524th 1525th 1526th 1527th 1528th 1529th 1530th 1531st 1532nd 1533rd 1534th 1535th 1536th 1537th 1538th 1539th 1540th 1541st 1542nd 1543rd 1544th 1545th 1546th 1547th 1548th 1549th 1550th 1551st 1552nd 1553rd 1554th 1555th 1556th 1557th 1558th 1559th 1560th 1561st 1562nd 1563rd 1564th 1565th 1566th 1567th 1568th 1569th 1570th 1571st 1572nd 1573rd 1574th 1575th 1576th 1577th 1578th 1579th 1580th 1581st 1582nd 1583rd 1584th 1585th 1586th 1587th 1588th 1589th 1590th 1591st 1592nd 1593rd 1594th 1595th 1596th 1597th 1598th 1599th 1600th 1601st 1602nd 1603rd 1604th 1605th 1606th 1607th 1608th 1609th 1610th 1611st 1612nd 1613th 1614th 1615th 1616th 1617th 1618th 1619th 1620th 1621st 1622nd 1623rd 1624th 1625th 1626th 1627th 1628th 1629th 1630th 1631st 1632nd 1633rd 1634th 1635th 1636th 1637th 1638th 1639th 1640th 1641st 1642nd 1643rd 1644th 1645th 1646th 1647th 1648th 1649th 1650th 1651st 1652nd 1653rd 1654th 1655th 1656th 1657th 1658th 1659th 1660th 1661st 1662nd 1663rd 1664th 1665th 1666th 1667th 1668th 1669th 1670th 1671st 1672nd 1673rd 1674th 1675th 1676th 1677th 1678th 1679th 1680th 1681st 1682nd 1683rd 1684th 1685th 1686th 1687th 1688th 1689th 1690th 1691st 1692nd 1693rd 1694th 1695th 1696th 1697th 1698th 1699th 1700th 1701st 1702nd 1703rd 1704th 1705th 1706th 1707th 1708th 1709th 1710th 1711st 1712nd 1713th 1714th 1715th 1716th 1717th 1718th 1719th 1720th 1721st 1722nd 1723rd 1724th 1725th 1726th 1727th 1728th 1729th 1730th 1731st 1732nd 1733rd 1734th 1735th 1736th 1737th 1738th 1739th 1740th 1741st 1742nd 1743rd 1744th 1745th 1746th 1747th 1748th 1749th 1750th 1751st 1752nd 1753rd 1754th 1755th 1756th 1757th 1758th 1759th 1760th 1761st 1762nd 1763rd 1764th 1765th 1766th 1767th 1768th 1769th 1770th 1771st 1772nd 1773rd 1774th 1775th 1776th 1777th 1778th 1779th 1780th 1781st 1782nd 1783rd 1784th 1785th 1786th 1787th 1788th 1789th 1790th 1791st 1792nd 1793rd 1794th 1795th 1796th 1797th 1798th 1799th 1800th 1801st 1802nd 1803rd 1804th 1805th 1806th 1807th 1808th 1809th 1810th 1811st 1812nd 1813th 1814th 1815th 1816th 1817th 1818th 1819th 1820th 1821st 1822nd 1823rd 1824th 1825th 1826th 1827th 1828th 1829th 1830th 1831st 1832nd 1833rd 1834th 1835th 1836th 1837th 1838th 1839th 1840th 1841st 1842nd 1843rd 1844th 1845th 1846th 1847th 1848th 1849th 1850th 1851st 1852nd 1853rd 1854th 1855th 1856th 1857th 1858th 1859th 1860th 1861st 1862nd 1863rd 1864th 1865th 1866th 1867th 1868th 1869th 1870th 1871st 1872nd 1873rd 1874th 1875th 1876th 1877th 1878th 1879th 1880th 1881st 1882nd 1883rd 1884th 1885th 1886th 1887th 1888th 1889th 1890th 1891st 1892nd 1893rd 1894th 1895th 1896th 1897th 1898th 1899th 1900th 1901st 1902nd 1903rd 1904th 1905th 1906th 1907th 1908th 1909th 1910th 1911st 1912nd 1913th 1914th 1915th 1916th 1917th 1918th 1919th 1920th 1921st 1922nd 1923rd 1924th 1925th 1926th 1927th 1928th 1929th 1930th 1931st 1932nd 1933rd 1934th 1935th 1936th 1937th 1938th 1939th 1940th 1941st 1942nd 1943rd 1944th 1945th 1946th 1947th 1948th 1949th 1950th 1951st 1952nd 1953rd 1954th 1955th 1956th 1957th 1958th 1959th 1960th 1961st 1962nd 1963rd 1964th 1965th 1966th 1967th 1968th 1969th 1970th 1971st 1972nd 1973rd 1974th 1975th 1976th 1977th 1978th 1979th 1980th 1981st 1982nd 1983rd 1984th 1985th 1986th 1987th 1988th 1989th 1990th 1991st 1992nd 1993rd 1994th 1995th 1996th 1997th 1998th 1999th 2000th 2001st 2002nd 2003rd 2004th 2005th 2006th 2007th 2008th 2009th 2010th 2011st 2012nd 2013th 2014th 2015th 2016th 2017th 2018th 2019th 2020th 2021st 2022nd 2023rd 2024th 2025th 2026th 2027th 2028th 2029th 2030th 2031st 2032nd 2033rd 2034th 2035th 2036th 2037th 2038th 2039th 2040th 2041st 2042nd 2043rd 2044th 2045th 2046th 2047th 2048th 2049th 2050th 2051st 2052nd 2053rd 2054th 2055th 2056th 2057th 2058th 2059th 2060th 2061st 2062nd 2063rd 2064th 2065th 2066th 2067th 2068th 2069th 2070th 2071st 2072nd 2073rd 2074th 2075th 2076th 2077th 2078th 2079th 2080th 2081st 2082nd 2083rd 2084th 2085th 2086th 2087th 2088th 2089th 2090th 2091st 2092nd 2093rd 2094th 2095th 2096th 2097th 2098th 2099th 2100th 2101st 2102nd 2103rd 2104th 2105th 2106th 2107th 2108th 2109th 2110th 2111st 2112nd 2113th 2114th 2115th 2116th 2117th 2118th 2119th 2120th 2121st 2122nd 2123rd 2124th 2125th 2126th 2127th 2128th 2129th 2130th 2131st 2132nd 2133rd 2134th 2135th 2136th 2137th 2138th 2139th 2140th 2141st 2142nd 2143rd 2144th 2145th 2146th 2147th 2148th 2149th 2150th 2151st 2152nd 2153rd 2154th 2155th 2156th 2157th 2158th 2159th 2160th 2161st 2162nd 2163rd 2164th 2165th 2166th 2167th 2168th 2169th 2170th 2171st 2172nd 2173rd 2174th 2175th 2176th 2177th 2178th 2179th 2180th~~

Fraudulent Conveyances. No. 2.

(23)

The opinions are contradictory on the question whether 2 Ler 70 a mere surety to whom a lease is made as indemnity 5 Co 24. is a purchaser within 27 Eliz.

Hutt 84.

The weight of Authority is in favor of the surety. 2 Ke 6499

Rob 408. 6.

2 Jac 205. n

Rob 374.

2 Rolle 783.

In this state a surety would not hold under an absolute lease. for our Ct have held that an absolute conveyance to a surety where indemnity only was intended is itself void.

(24)

When a valuable considⁿ is paid by the party claiming Rob 376. the protection of the stat it seems to be immaterial what species of right or int^d is purchased or whether it be a positive int^d or the extinguishment of an int^d.

(25)

And it is not material how large or small a bona fide sale for value is. Et gra. a lease for years may hold ag^t a prior voluntary purchaser of the fee. tho' the prior voluntary purchaser w^d undoubtedly hold the fee after the determination of the lease.

2 Vern 327

2 Bl 4019

Bro 181

Rob 376. 7.

2 (26) If A makes a fraudulent conveyance to B & afterwards
2 Ven 473. a voluntary conveyance to C. & C sells to D for valuable
Rob 383:4. 498:9 consideration. D cannot avoid the prior fraudulent
658. conveyance to C. for C conveys to D only his (C's) interest
Morr 602:533. but between D & C. C has no interest.

(27)
3 Mm 422 A trustee under a voluntary settlement, cannot become
Rob 389:500 a bona fide purchaser so as to defeat the voluntary
settlement, for it is a breach of trust in the trustee
to purchase.

(28)
Noy 105. A person who makes a purchase in his own name
Rob 391. with the money & for the use of another is a purchaser
within the Stat.

(29)
Rob 223:4 This it extends as well to personal as to real property.
1 Day 258. but where there is a vol conveyance of money or other
personal chattel if it is consumed or transferred to
a third person before the br can take it in Est. his
remedy as to the particular prop is gone forever
& the same rule holds of a purchaser.

It can Chancery in such case give any remedy
 And the consequence w^d be the same if the prop^y
 not be found.

However one remedy is still left for him he may sue
 for the penalty under the Statute

According to some opinions, a voluntary gift of
 money is not within the 13th Eliz.
 1 Eq. ca 449
 2 Vent 490
 Rob 424

On the grounds that money cannot be taken in
 Ex^{te} (see title test. 18)
 But money I think can be taken on Ex^{te} vide Ex^{te} per 1 branch
 also Ex^{or} & Administrators.
 116. 134
 2 Shors 166
 Doug 210:30.

If a bond be given for reparation for seduction it
 is void in equity as is the obligors bond. tho'
 good as between the parties. (see cont 68-) (post 39)
 (31)
 2 Mils 339
 3 PM 222
 339. Rob 629
 Talb 173.
 1 Eq. ca 87
 2 Jb 182. 258.

And it seems that a conveyance of prop^y for such consid^r
 would also be void as ag^t bona fide purchasers & vend^{ors}

(32) It is a frequent practice for debtors to convey their property to trustees for the pay^t of debts.
 1 Leon. 194 Now it has been decided that such a conveyance when
 2 Vern 570. no creditor is party to the deed, is void as against dissenting
 Rob. 249. creditors & as against subsequent bona fide purchasers for the
 429. 30 trustees are strangers to the valuable consideration

4 Day 146. 395 The rule is directly the reverse in this state in
 2 Com. 633 this state the brs are presumed to assent until the
 2 Root 26 contrary is shown -
 1 Stra. 165
 3 Co. 267

3 Co. 81 But in Engl^d if any one br is party to such conveyance
 5 D.R. 420 the conveyance is supported by valuable consideration
 1 Burr 478. and is good as to all the creditors. that is the
 8 D.R. 521 brs can not take the property conveyed on Ex^t &
 5 D.R. 335. 420 thus set aside the conveyance to trustees. & if
 4 D.R. 167 the conveyance is to trustees one of the creditors
 1 Camb. 448. being one of the trustees in trust for the pay^t of
 2 Mass. 442 one half of his creditors. is good & the omitted brs
 1 Quincy 500 can't set aside the conveyance.
 5 D.R. 426. 530
 2 John. 226.
 1 John. 156.
 5 D. 413
 3 Day. 340.
 4 Day 146.

A conveyance or assignment of property to trustees made in a neighbouring state according to the law Nails of that state is good in this state. *lex loci* see Huntington 111.

- 3 Dakap 370
- 2 Dakap 89
- 1 48665.
- 47 C 182.
- Conp 175. 343.
- 3 Branch 73.
- 5 East 124.

If however some of the effects of the br & some of the brs. in this state. & if the assignment were by a positive law forbidden then the conveyance in the neighbouring state w^d not I trust be valid

And such a conveyance for the pay of debts *Ab 432. 3.* when valid according to the rules laid down is *5 Burr 2630* valid it seems tho' the debts secured by the conveyance are barred by the *Act of limitations*. *Long 629.*

- 2 Burr 1099
- 37 C 4454.

And it seems that a conveyance to pay debts barred & *ipso facto* revives the remedy & removes the statute bar, *25 B 340* *Exp Dig.*

(34)

fraudulent

Conveyances

3 Bpms 222 & none of the creditors are trustees & the creditors
 Rob 434 bring a bill in chancery to compel the trustees
 1 Ch R 33. to perform the trust & a decree is made the
 decree validates the conveyance ab initio.

The conveyance by this decree receives the
 sanction of a c't of competent jurisdiction.

(35)

1 Bpms 165 Donations to charitable uses are in genl void
 Hyl 675 as to b's (if the dona is indebted at the time)
 1 Vern 230 construed 43 Eliz. - It is not settled that
 Rob 438. such donation n: be void if the donor
 was not indebted at the time tho' afterwards
 becoming so &c,

Here if the donor be not indebted at the time
 the donation at supra is void ag't subseq
creditors. In this country such donations
 must stand on the same ground as a
 voluntary conveyance to a mere stranger

(36)

Copied. Donatio mortis causa must be void as ag't
 Rob 442. H. donor's creditors. for it is testamentary but if
 1 Bpms 406. cause good ag't the representatives of the
 2 Wils 111. donor,

Wils. 111.

In Chancery a conveyance to trustees for the pay of a debt is not void as against the plaintiff claiming ex delicto tho' the conveyance was made title pendente lite for the express purpose of keeping it out of the hands of the plf. for the Plf is neither a cred nor a bona fide purchaser. 1 Eq: ca 449 Robt 486 574.5.

But this rule is not very satisfactory.

But if the conveyance had been made after judg recovered it w^d be void. tho' ex had not been issued - for after judg the Plf becomes a creditor. Robt 573.4. 577. 1 Leon 247

37) if voluntary settlement made between the date Plf in breach of a covenant where the covenant gives a right of damages only. the settlement is not void unless there is actual fraud. i.e. q. a. The covenant in a deed of conveyance - No debt exists at the time of conv. - Robt 550.1

But this applies only to a covenant which gives a right to damages merely. but if the covenant was for the pay of a sum certain at a given time. the rule w^d be diff for here is an existing debt.

(37)

Fraudulent

Conveyance || ^{with his own money} in conveyance on it to be conveyed to
 Brobussou. the originally, as to a son, the conveyance is
 Ver. 490 not so as to the creditors of the father unless
 Rob 463:7 it appears to have been purchased in trust
 1 M. 111. 688 for the father. even tho the father holds possession
 2 E. 415. during the minority of the son. for he takes
 possⁿ of the land as gaucidean for the
 son - tho' if the son had been an adult this
 possⁿ w^d have been evidence of a trust,

18th 44. But under the English Bankrupt laws in such a case
 Rob 494. the creditors may take the land

100 E 291 In case if one has a power over property in
 Rob 467:4. another's right a conveyance of it by the former
can't be fraud^t as ag^t his creditors.

21th 187. But if one having a power over another's property
 7th 140. conveys it in trust for himself his creditors may set
 10th 407 aside the conveyance (ie may set aside the
 Rob 491. conveyance made after & in pursuance of the
 10th 431. trust. for the hus^d has the equitable int^y
 by this conveyance in trust for himself -

And whenever one having a power of appointment conveys ment on his own voluntary appointment to others is in equity void as ag^t creditors of the appointor McC in 62 50
 ex. It devotes to a the power of disposing of 232 qvix 90
 his (B's) property as he pleases now if a convey 240 n 314. 46
 voluntarily to B. The latter cannot hold ag^t 304 62 69 65
 A's creditors - for the property is virtually the debtors
 property of A. A has a right to make it 66 472. 77.
his own -

The validity of voluntary bonds is gently tried McC in 61 7 307
 in equity. In the life time of the obligor, the 14th 293
 question cannot be tried at law unless 26 475.
 the obligor's property is taken ^{in Execⁿ}. But in Eq. McC in 61 7 370
 a bond merely is may be postponed -

McC in 61 7 370
 The bond is void as to the creditors of the obligor
 as to the obligor's property is taken in Execⁿ.
 But in Eq. the bond is not void as to the obligor's
 property is taken in Execⁿ. But in Eq. the bond is not void
 as to the obligor's property is taken in Execⁿ. But in Eq. the bond is not void

But after the obligor's death the question is frequently McC in 61 7 370
 tried at law. As the cred^r sue the Ex^r &
 the ex^r pleads this bond outstanding in
 law the Pl^t may reply per fraudem &c

The fact of a bond remaining in the hands of the McC in 61 7 370
 obligor is a strong badge of fraud or at least
 raises a strong presumption that it is
voluntary -
Eq. ca 206.
14 62 55.
1 P M 237
66 486 5.
66 6 7.
McC in 61 7 372.

(41)

Fraudulent

Conveyance

1. 31b 625.

1. 31b 627

2. 31b 574.

3. 31b 522.

Rob 488. 6.

643. 661.

(ante 14. 14)

20. 54. 5

61/

But such voluntary bonds are in gen^l good as
 as more volunteers. as legacies & those claiming
 under the st of distributions & the obligor's admin^r.
 & by is cannot set aside a voluntary or fraudulent bond
 unless for the purpose of paying the debt for bona
 fide creditors. If then an ex^r is sued
 on such bond he must plead not only
 that the bond is fraudulent but that
 there are outstanding debts &c -

(42)

31b 627

2. 31b 202.

2. 1. 489. 90.

If a bond &c is voluntary or fraudulent a judgment
 confessed upon it is also voluntary or fraudulent
 for the st includes as well fraudulent judgments
 as fraudulent bonds &c.

40b 327

Rob 489. 90.

As to onus probandi if a judgment claims to be fraud^{ul}
 is obtained on confession the onus probandi lies on
 the plf in the judgment but where a judgment has been
 obtained on trial the onus probandi lies on the
 party impeaching the judgment

1. 31b 574. 20

3. 31b 340.

4. 31b 141.

1. 31b 436.

1. 31b 407. 77

1. 31b 82. 85.

1. 31b 629

1. 31b 66. 10. 190

1. 31b 492

1. 31b 100

The mere preference of one Cr to another does not
 render a judgment or indeed any contract void under
 the 13th Eliz.

The English Bankrupt Law indeed modified
 this rule. But by the C L a man may give
 a preference to creditors. 2 John Ch 222

But the ex^r can give no such preference except
 between Crs in equal degree. 1. 31b 329.

A conveyance void in its creation may become good in favour of a bona fide purchaser by matter of post facto. But this rule is not well expressed.

fraudulent

conveyance

1 Sid 133

Robt 495 435.

40th 477

Sta 243

3 Lev 17

Conc 222

244.

10th 45.

Supd 40.

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

10th 332

(45)

• Fraudulent

Conveyance

Bro 4455.

Talch 65.

2 Bul 225

Rob 517: 18

• A conveyance originally good cannot become fraudulent by matter ex post facto. Ex gra. a bona fide mortgage permits the mortgagee to remain for a great length of time ~~which~~ does not make the mortgage fraudulent (tho' it may perhaps be a badge of fraud.) & unless the grantor remaining in possession is guilty a badge of fraud.

(46)

4 Day 254.

Talch 63.

1 Fon 6322.

Rob. 521.

A fraudulent grant can never become legitimate in favour of the fraudulent grantee even by any length of possession. (Black & Catlin)

• If a debtor makes a fraudulent conveyance to B. B continues in possession 30 yrs the creditors of A may still take & hold the land ag^t B.

• If B's possession is fraudulent. & to allow him to acquire title in this case w^d be to allow him to acquire title by continuance of fraud.

The parties affected by such fraud must be dispeized. but the creditors of A never had a right of possession & therefore were never dispeized. & therefore they cannot be barred.

Time never bars a fraud. Talch 63.

The 13th & 27th Eliz are like all stat of fraud construed liberally so far as they act upon the fraudulent transaction. but so far as they inflict penalties, they are to be construed strictly. as penal laws always are "McLau 19-22"

In construction these stat have been held to include cases not within the terms of the statute. is the letter of the Vent 257
Thus where tenant for life committed a forfeiture Rob 590 that the reversioner who was privy to the fraud might enter & defeat the creditors of the tenant for life now this forfeiture has been held void as against the creditors of the tenant for life. —

- 47) Badges of Fraud. 36081.
1st The fact of the grant being genl including all the grantor's property. is a badge of fraud as regards Robt. creditors. More 638
2nd The fact of the grantor remaining in possession after an absolute sale for any considerable length of time. — This indicates a trust — a sham sale. Rob 197. 200. 548. 555. 71.
3rd The fact that the grant is made in secret. Rob 559

4th Where a conveyance is made pending an action for a debt against the grantor. (under 13th only) 1 Vern 459. Rob 578.

5th The fact that there is an apparent trust between the parties. If the trust is established It clearly is a fraud —

17
Fraudulent
Conveyance

Badges of Fraud

6th suspicious clauses in the conveyance. as 'this deed is made bona fide &c'

7th a conveyance made in the absence of the grantor to a stranger. (not in all cases)

8th the grantor retaining the deed in his possession

9th the grantor being involved in debt. this applies chiefly to the 13th & 14th.

10th a clause of procuration. (strong)

5 Co. 51. Rob. 456. 558. 559. 611-641.

There may be other badges than these but these are the more usual. These are all mostly conducive to prove the 5th badge which is the strongest badge for the apparent trust means merely a sham sale. but every fraudulent conveyance is not of course a fraudulent sale. for a conveyance may be fraudulent & void where a full consideration is paid if the vendee is privy to the fraudulent intent.

As to the 2^d badge the possession continuing in the vendor is not so strong a badge in the case of land as in that of personal property. But it is a strong badge in either case. The rule supposes that the possⁿ is inconsistent with the conveyance - If there is no trust why does the grantor remain in possⁿ?

(49)
Fraudulent
Conveyance
Rob 558.9
558.

Where the grantor not only remains in possession but accompanies that possession with acts of ownership the presumption is much strengthened. —

When the grantor remains in possession of land the presumption of fraud may be rebutted by showing reasons why the grantor sh^d remain in possession. 27 L. 587. 595.
But it has been held that the possession of goods by the vendor after an absolute sale is per se fraudulent. & no proof admitted to rebut the presumption. — This refers to the 13 Eliz.
Rob 563.4
558.
Pres in Ch 287
2. Bal 225.

But this last rule is frequently contradicted in the books & it is held that this possession is only a badge of fraud. & this appears to J.B. to be the better opinion. — both by authority & reason,
36. 81. a
Comp 402
2 B. 459. 52.
1 Wils 44.
3 Esp R 32. 32.
Bull 1857.
19 John 68. 156.
Rob 563. 71.

In this state the question has been decided both ways in the sup^r Ct. —

50) If immediate delivery of goods is impossible the want of possession by the vendee is neither a badge of fraud nor makes the contract per se fraudulent. Et if a ship or cargo at sea is sold But the ship must be delivered as soon as convenient after her arrival,
1. Atk 160
27 R. 462.
1 Ves 354. 361.
366.
7 T. 71.
1 Burr 473.
1 Br 62. 125.

And when immediate delivery is very difficult, a symbolical delivery is suff^t as where a key of the warehouse in which the goods are is delivered to the vendee. —
1. Atk 17.
7 T. 71
1. Atk 1720
Rob 550.

(50)

Fraudulent
Conveyance

which is always called a symbolical delivery but it is a mere delivery of that which gives the vendee a power over the goods - & symbolical delivery is the delivery of one thing as the representation of another - merely for the sake of making the contract binding.

The rule appears in Conn^t to be that in general, & except in certain exempt cases, if the vendee suffers the vendor to remain in possession of personal chattels sold, the sale is deemed in law fraudulent, and the vendee will not be permitted to show that the sale was in fact bona fide. the retention of possⁿ by the vendor after a sale is here treated as in general conclusive & irrefutable evidence of fraud 9 Conn^t R 63. 5 Conn^t R 196 9 Conn^t R 134.

The English cases allow the vendee of property to ~~leave the property in~~ ^{leave the property in} the possession of a former owner of it, the former owner not being the immediate vendor thus in Guthrie & al v Wood 1 Stark 367. the purchaser of goods, under a distress for rent was permitted to leave the goods in the hands of the former owner against whom the distress issued. In Kidd v Rawlinson 2 B & P 59 the goods of A were taken in Ex^t & sold by the Sheriff to B who allowed A to continue in possession, and it was decided that B might hold the goods ag^t a subsequent purchaser from A.

see other cases, where the sale has been held good because the sale was made by a third person & not by him in whose possession the goods were permitted to remain 4 Stark 620 1 M & S 251. 4 Barn & C 652. 8 Taunton 338. 13 B Moore 159.

Fraudulent Conveyances (No. 3)

When the grantor or vendor's possession is consistent with the deed of conveyance or with the conditions of the sale 2 Ball 225. the possession is no badge of fraud. Rob 558. 540.

As if land or goods are sold on a condition precedent. 561. 147-9.

As also a mortgagor's, remaining in possession, but a mortgage of goods is void under the Stat 1411th if the mortgagor continues in possession & becomes a bankrupt. 2 T. R. 574. 1 Ves 365. 9. Precm 6287 that it is void as to creditors of the bankrupt. Cro Jac 455. Shep. 65. Rob 557. 577-9

The Statute 21 Jac 1st is as follows.

If a person becoming insolvent is allowed to be in the possession of another's goods the creditors of the bankrupt may take the goods but this Stat has nothing to do with fraud. "vide Bailment" 197. 1 Atk 160. 2 Ves 348. 1 Wils 260. 1 Ves 244. Exp^{ts} Dig 556. 1 Hale 226.

If a creditor having seized goods on Exp^{ts} allows them to remain long in the hands of the debtor they are liable to be taken on the exp^{ts} of another creditor. but this is under 21st Jac 1st & this Stat has no force here. yet as it is in affirmance of the common law this rule may perhaps prevail here. Watson D123 1 Ves West 414

Fraudulent Conveyance

Another badge of fraud was that the conveyance
1 Leon 247 was made pending a suit ag^t the grantor. this
Rob 573-8. is a badge only under the 13 Eliz.

Exp 295a

1 Leon 247. and a conveyance after judgt^t has been had ag^t the
Rob 573-8. grantor and before satisfaction has always been
1 Vern 460. considered as a badge of fraud. & a strong badge
of fraud -

The cases in all these badges operate as a presumption
of fraud are only where the grantor does not retain
other property in his hands sufft to satisfy his debts.

3 Co 32.

1 Roll 34.

Rob 552.

1 K 357.

If one conveys his lands with intent to commit a
forfeiture by a crime & then commits the crime
the conveyance will be fraudulent & void as ag^t
the crown or state. this is on the principles of
the common law.

And if one makes a voluntary conveyance & soon Conveyance
 afterwards commits a forfeiture. fraud will be Robts.
 inferred. even tho' express fraud cannot be proved

Mode of taking advantage of these Statutes.

The party taking advantage of these statutes treats Bro & 223.
 this fraudulent conveyance as if it had never been Dyce 295.
 made. Thus the br attack the property as tho' Robts 58.
 property of the grantor taking no notice of the 36075.
 fraudulent grantee. and then when the br have Bro & 233.
 acquiesce till they bring judgment agt the grantee
 Sometimes indeed recourse is had to Chancery to
 set aside the fraudulent conveyance

When the question is raised by special pleading the
 property is treated as if no conveyance had been made. Ho 6272
 Thus a fraudulent grantor dies. a brd brings an action Dyce 149 a m
 agt the heir at law. if the heir ^{pleads} no appts. Bro & 233.
 the br replies that he has appts. to wit the prop? 56060.
 fraudulently conveyed & proves the fraud. Robts 603.
 Bro & 810
 R. 659: 25.

Fraudulent
Conveyances

The first & direct step then is for the creditor to attack the property as the property of the debtor & proceed as if no conveyance had been made.

bro & 810. If one having made a fraudulent sale of goods or
2. b. 592. 3. lands dies. then goods &c. are assets & may be
595. seized on the Ex^r of the cred^r. or if the Ex^r
pleads no assets the Cr replies 'assets' & proves the
fraud.

In this state the ~~real~~ property of a person deceased
is never taken in Ex^r the prop^y must be sold
by the Ex^r.

Here therefore the cred^r may claim that the
conveyance was fraudulent before the probate Cr
& the Ex^r may sell. & the fraud^r grantee may
be sued in assumpsit. or vice versa.

So a debtor having fraudulently conveyed personal
property & dies. the cred^r can not take the property
but the proceeding is the same as in the case of
real property.

2. 1243. 378. In England if one dies after a fraudulent conveyance
3 Bl 430. of his real property, his simple contract debts
Love 93. cannot take this property in Ex^r.

Under 13 Eliz. the fraudulent purchaser of goods Conveyance
 if he takes prop. after the vendor's death may be consid. bro 271
 as a stranger who intermeddles with the Feb 197
 appts. and he may be treated as executor of his 2 Leon. 233
 own wrong. For the sale is a mere nullity 27 R 587
 Or he the creditor may bring his action aft the bro 271
 rightful Ex'or & seize the property fraudulently 3 Leon. 257.
 conveyed. ut ante. Ex p. 257

the first rule supposes that the rightful Ex^r Bullenk 258
 has permitted the fraudulent grantee to take possⁿ.
 of the goods. then the Ex'ors cannot claim back
 the property from the grantee & therefore ex
 necessitate rei the creditor may treat the grantee
 as executor of his own wrong.

And the same is the rule if the fraudulent vendor 27 R 587
 takes the property after the vendor's death ut ante bro 271
 without the permission of the Ex'or if he takes the property before
 probate of the will. or before admⁿ granted - for
 here the same necessity exists. There is no other
 way of recovering the goods

If the vendor take the goods after the vendor's bro 2810.
 death & with permission of the rightful ex'or & after Rob 594.
 probate of the will. the grantee cannot be treated 5 Co 33
 as ex'or of his own wrong. for here is no necessity. talk 313.
 for the rightful ex'or may reclaim the appts.

sed contra in some decisions. according to them Bullenk 258.
 the Ex'or may in this last case treat the vendor bro 271.
 as ex'or of his own wrong. And this last appears Ex p. 257.
 to be the better opinion. tho' perhaps not so
 well supported by authority as the former.

(57)

Fraudulent
Conveyance In the state it is doubtful whether there
can be an Ex'r of his own wrong. for if there
can be an Ex'r of his own wrong the average
law w^d be defeated. (there are no cases)

Gr 810. A fraudulent sale regularly binds the vendor & his
Robt 43. Hs. representatives yet the Ex'r or admin^r may claim
661. as if such a sale for the benefit of creditors. This
Gr 1270. has been frequently decided in this state. — They
can however claim them for no other purpose
as for legacies &c,

(58) 56960 If an heir makes a fraudulent conveyance of
Reor. 11. an estate descended to him for the purpose of
Popk 155. defeating the creditors of his ancestor. such
Robt 601. conveyance will be void as ag^t the creditors of the
Hlard 441. ancestor —

Gr 405. Same rule in case of a fraudulent sale by the
Robt 601. gr Ex^r or Administrator for the purpose of
defeating the Cr^s of the testator or intestate

Fraudulent
Conveyance

The remedy in the last ~~two~~ cases is in a b of equity & that b. will pursue the property in the hands of the vendee & will treat the vendee as trustee to the creditors.

These bids indeed may seize the prop^y if they can find it, but if they cannot the only remedy is in a C of Chancery.

But a bona fide purchase of the apt. from the 1st 4/63.
Ex'or admin'r will hold them apt all creditors 20th M^{ch} 49.

If the purchaser is honest he must hold
however fraudulent the intention of the
exor for he has a right to sell

A fraud^d conveyance is binding on all those who claim as volunteers under the vendor or grantor.

207 (57)

1. 1100 80

406 166

36012.

2. *Myrica* 222

8,6641-4.

True therefore where a voluntary grantor attempts to give to his

a collateral act to set aside the conveyance a 206 648, 654, 17

6. of equity will sometimes entrap & protect the 2nd term 69.

conveyance. This rule will not extend to cases 188m57

of actual fraud

1 cladd 326. (18 Ves 84 contra)

But a voluntary ex agreement will not 1. Pow. C34

in gent bind the representatives for in gent 2 Pm 24th.

It is not binding on the venda himself Amb 466.

+ 18th Ves 84, contra - & also in this case it was 3 Br Ch 12

determined that where Grantor does defeat his own Rot-660.

voluntary conveyance the voluntary grantee has

no remedy in Chancery. 1 Chadd 325. 4 Ves 93. + 112

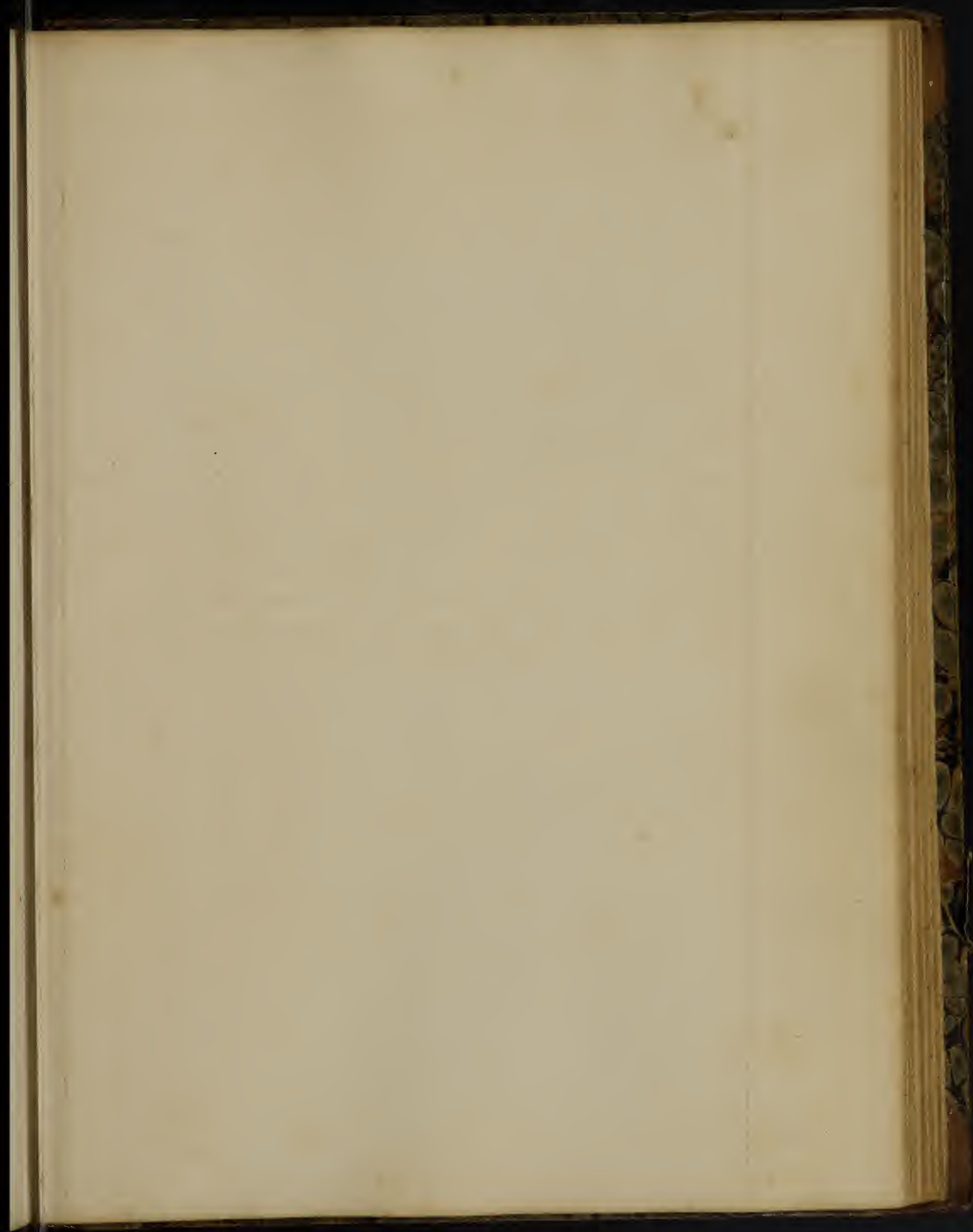
(Ch R 75 contra)

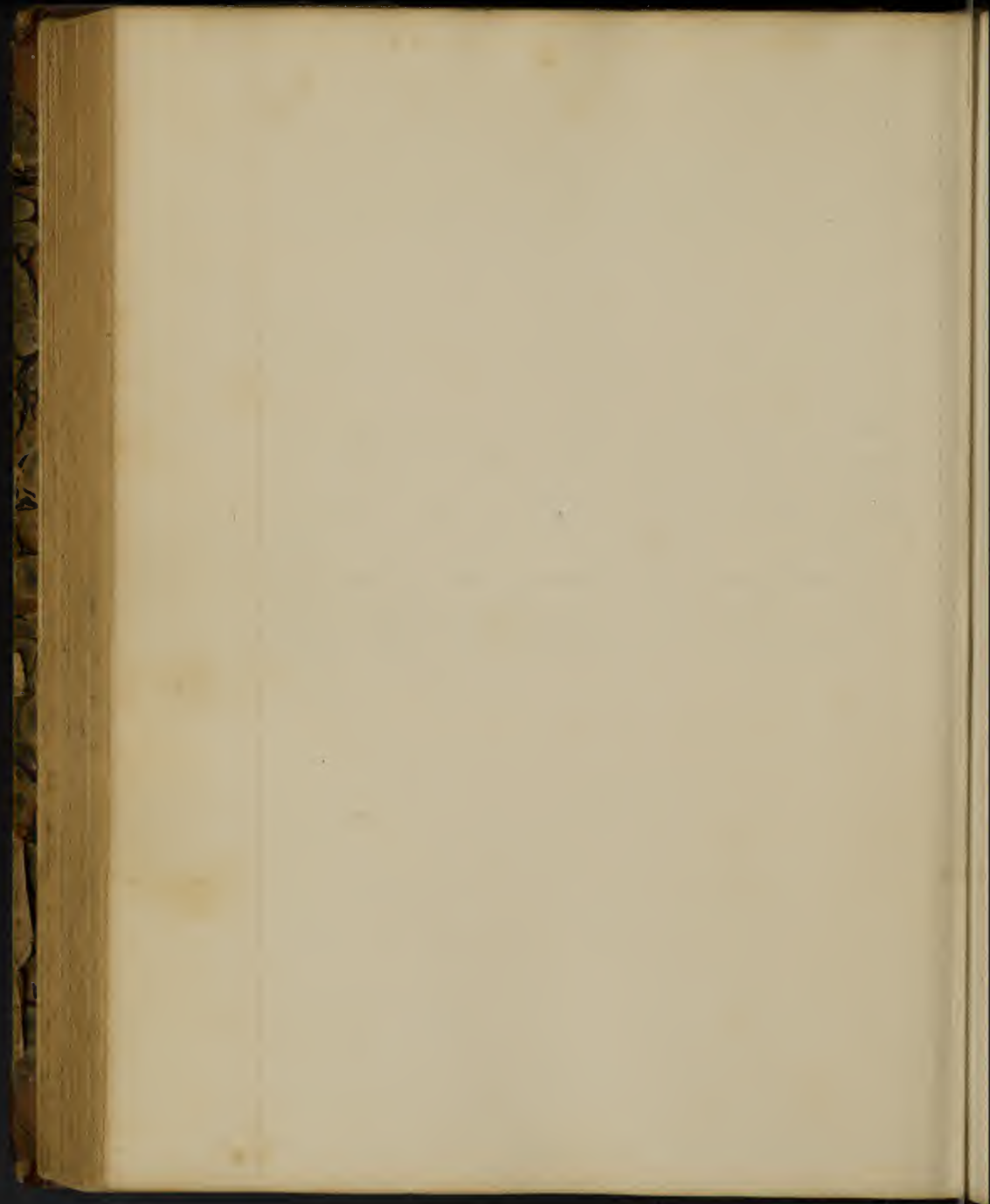
132.

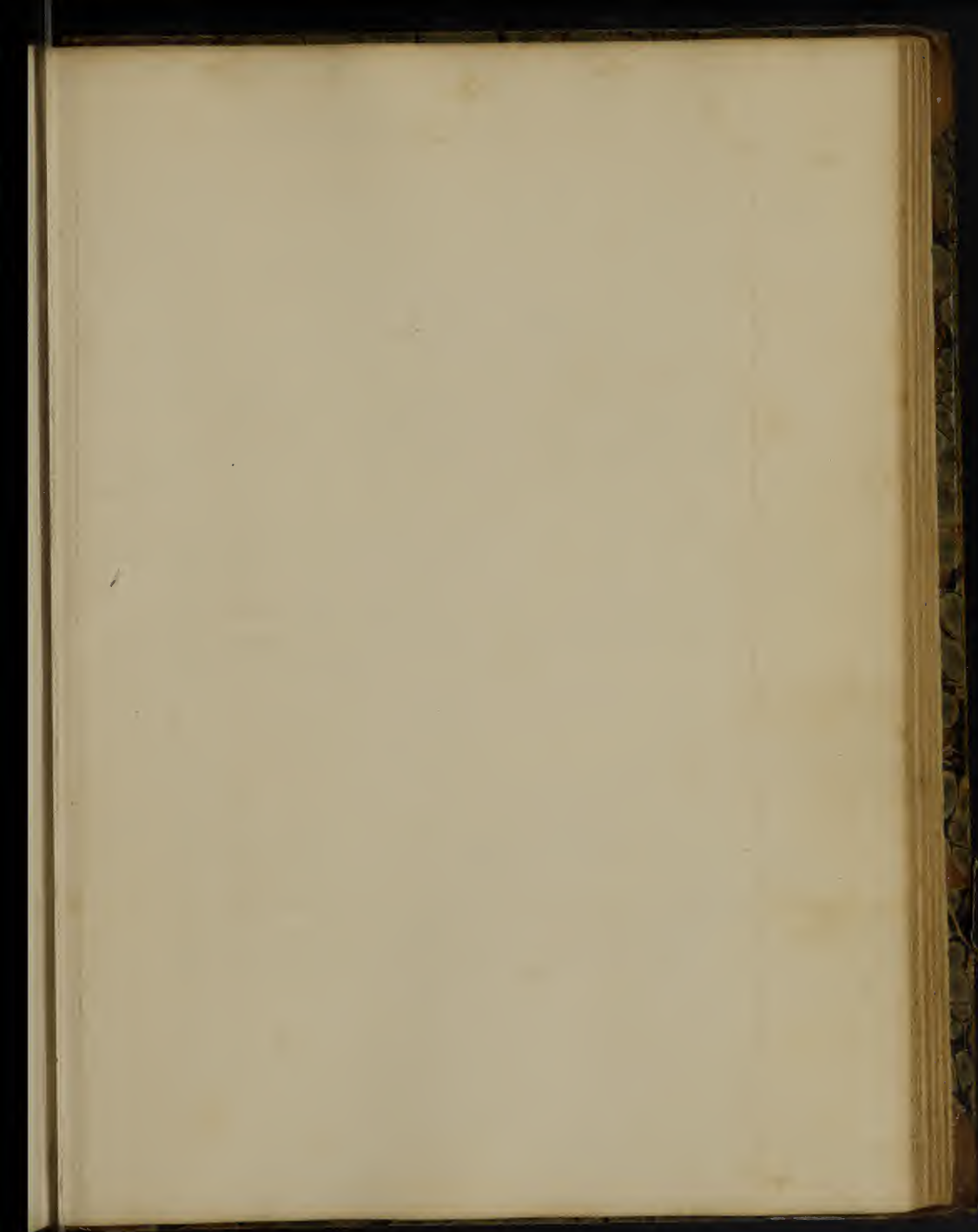
(Reich 230: Boulder 264.)

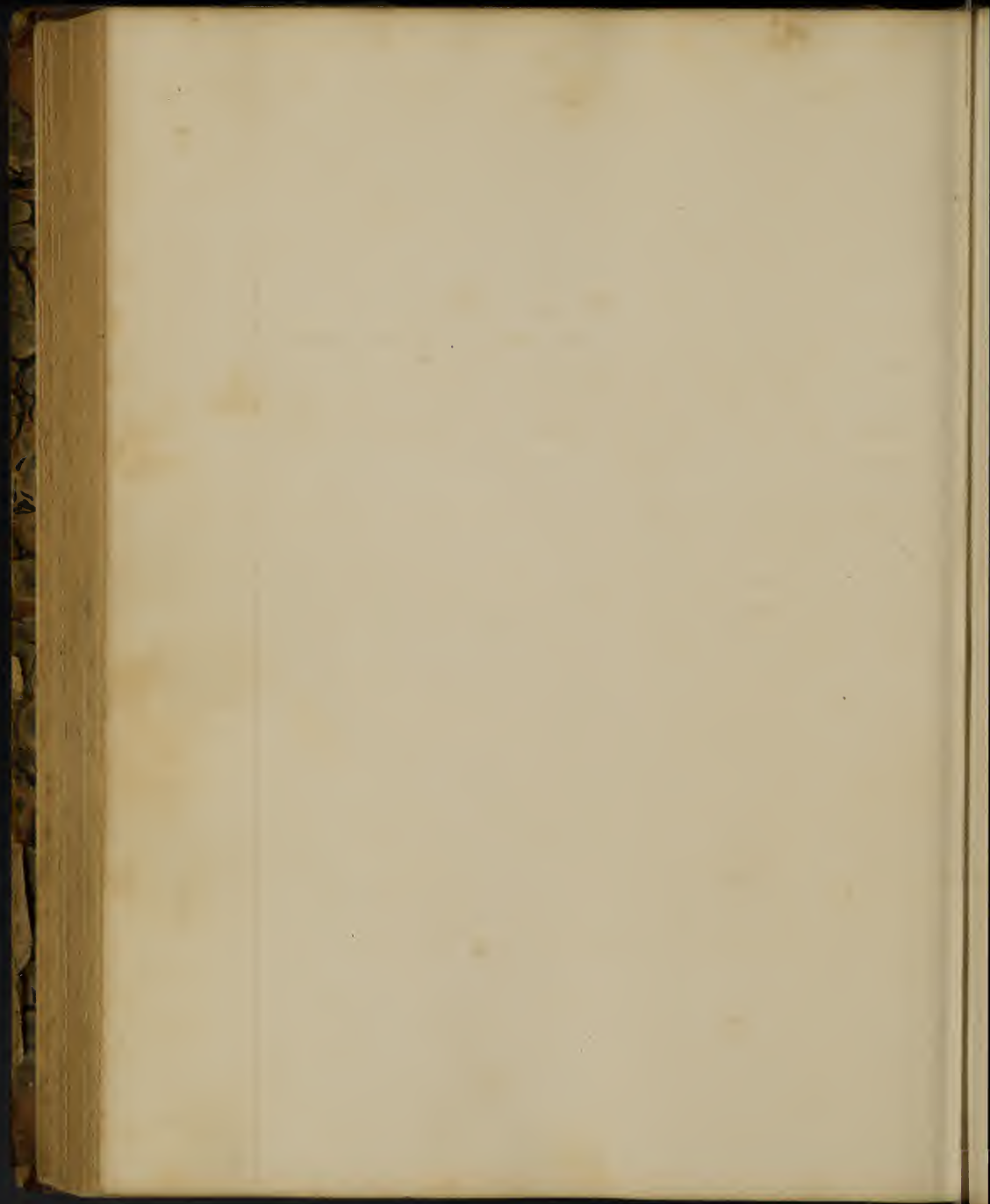
Alphonse, Comte de

373.









Powers of Chancery (N.1)

(1)

It is difficult to frame any precise definition of the powers of Chy. It has been said by Ed James that 1st Matt 5. it abates the rigor of the law. 2^o that it decides according to the spirit & not according to the letter of the law. 3^{thly} that it has peculiar jurisdiction over frauds, accidents & trusts. 4^{thly} that it is not bound by precedent or established rules but acts secundum equum et bonum,

In these particulars EdJ is clearly wrong. In not one of them is he altogether correct.

As to the first neither a Ct of law or of equity 2 Bl 378.
can abate the rigour of the law. many general 3 Bl 430
rules are manifestly unjust in their application to 2 Atk 229.
particular cases but in law & in Equity the genl
rule must be adopted.

II. It is said that a Ct of equity determines acc- 3 Bl 450:1.
ording to the spirit &c. But this rule of construction 434: 35
is common to both Cts - and in construing contracts 1 Bl 66.
the rules are in genl the same as in a Ct of law 509 264.
with the exception of penalties. "N. Law 24"

(4) Power of chancery

III. as to fraud accidents & trust, frauds of
Pou. 8090 almost every kind are cognizable at law. Some frauds
P. 111120738 only these as fraud in obtaining a devise of land
3d Ch 177 sometimes indeed a Co of equity will set aside
3d Ch 178 a contract for fraud where a Co of law cannot
if fraud in the consideration ~~is specifically~~ but for such a
fraud there is a remedy at law. in an action
in the case ag^t the fraudulent party for damages

3d Ch 131. Many accidents may be relieved ag^t in law as
5 Co 74. 5. well as in equity. Ex. loss of deeds &c. for this
mistake accident c^d not be relieved ag^t at
law.

3d Ch 130. And many accidents cannot be relieved ag^t even
in equity as a devise de executio &c

5d Ch 131. Many mistakes may be relieved ag^t in law ex.
5 Co 74. 5. Co of law can investigate mistakes in an acct. be
even where a balance has been struck & signed
by the parties -

3d Ch 132. Trusts it is true are fully cognizable in equity only
439. thus trusts whh create an interest merely equitable
2d Ch 522 are cognizable only in equity. But some trusts
2d Ch 67. are cognizable in a Co of law as deposits &
Ex. ca 384. all manner of bailments. so again in a pamphlet
2d Ch 312. for money rec^d to another's use.

4 Day 6. In this state there are a few instances in whh
an action on the case lies for the violation
of an equitable right - Ex. apigner of a
chore in action,

There is however one species of ^{mistake} accident which
can be relieved against only in Equity viz a mistake 2 Atk 34. 203
in the terms of a written instrument written 3 Bos 389
fraud 1 Port. com 433. 1 Vesey 318. 2 Vesey 376. 7. 1 Bro Chy 341. 1 Root 94.
2 Root 1. 78. 415. 499. 105.

For this relief must be had in Chy or not at all. for
the established rules of a Ct of law do not allow
in such a case any relief. Thus a bond intended
for \$100. is by mistake of the scrivener drawn for
\$1000. & is executed by the parties with the discovering
the mistake on a bill filed for this purpose the
Ct of Eqty. will compel the obligor to execute a note
for \$100 & the obligee to accept such a note. - But
this mistake will be rectified only on a bill
brought for the express purpose, of correcting it.
The proceedings at law are not adapted to
correct a mistake - a Ct of law must declare
the contract void in toto or wholly good,

¶ It is said that a Ct of Eqty is not governed
by precedents. This is not true - many rules
manifestly unjust are followed in this Ct because
the precedents are too strong to allow them to
be altered. for Example, vide 3 Bl 432. Portellat 312.
2 P Wms 640. 1 Atk 604.

(4) Powers of Chancery,

The difference between Cts of law & equity, chiefly consists in differe modes of administering justice in each, i.e. in the mode of proof the mode of trial & the mode of relief

The Mode of proof. Cts of equity proceed in a peculiar way to obtain evidence. Thus equity
3 Bl 551. compels a party to make discovery upon oath
437. 449. where facts or their leading circumstances rest
2 Ves 277 only in the knowledge of the party. Thus in
3 P.M. 148. case of accounts where common law evidence cannot easily be obtained.

By this means Cts of Equity have acquired concurrent jurisdiction over accounts

And as incident to accounts they take cognizance of the administration of personal assets and of debts legacies distribution & almost all cases of partnership, bailiffs & receivers &c.
2 P.M. 145. In most of these cases, Cts of law have concurrent juris & from this source viz the compulsive discovery upon oath the Ct has acquired jurisdiction over almost all matters of fraud. & over many subjects originally cognizable only at law,

But a person cannot maintain a bill in Equity if he might obtain adequate relief at law. If therefore a bill on an acct is brought a discovery on oath must be demanded or the bill will be dismissed. the mere necessity of discovery on oath gives Equity jurisd.

II Modes of trial. In the English Chy practice trials are conducted by written depositions whh 3 Bl 382:3
are introduced as evidence. In Court indeed 438.
witnesses in Chy are frequently examined viva voce

When a person is about to leave the Country or are already abroad or is aged + infirm depositions may be taken de bene esse to perpetuate their testimony, & on a bill filed for that purpose the Ct will issue a commission to take their depositions, and this may be done litte pendente vel non. by de bene esse is meant provisional depositions)

In law depositions taken in this way are not admitted if objected to. a Ct of equity will however compel a party not to object to them in a trial at law.

When a trial is actually pending before a Ct of law that Ct may issue a commission to take depositions in another state &c)

(6) Powers of Chancery,

In this way again a C^o of equity sometimes acquires jurisdiction over the main subject)
3 Bl 438. merely in virtue of its power to take such depositions where otherwise it has no such power jurisdiction.

3 Bl 436:8. Mode of relief. A C^o of equity enforces
1 Eq. ca 168 the specific performance of duties whereas a
3 P. M. 215. C^o of law can only give pecuniary damages for
1 F. m. b. 413. the breach of duty. The principle of which is
10 M. 532. this that a C^o of Equity considers as done
1 Vern 308. what ought to be or to have been done. i.e. that
C^o considers the right to the specific subject
contracted for as transferred by the express agreement.
And where as in cases of express contracts the
remedy at law is inadequate the C^o of Eq. acquires
concurrent jurisdiction. — Thus waste is prevented
by injunction for the remedy for waste at law
is inadequate. Thus again over questions that
may be tried at law by great multiplicity
of suits. as in the settlement of boundaries

These three diversities draw within the jurisdiction of
that C^o many cases not originally within its jurisdiction.

A C^t of Equity will set aside a deed for fraud in the consideration but at law the deed must stand for the obligor is in genl entitled to something & a C^t of Equity can give the obligor what he deserves but a C^t of law must compel the performance of the deed or consider it void in toto. it therefore compels the performance & leaves the obligor to his remedy in damages in an action agg^t the obligor. But in equity all this is done in one suit with greater perfection. —

There are other cases in which a C^t of law differs 3 Bl 439 from a C^t of Equity, there are cases in which the 434th court enforces stiff rules of justice particularly in cases of penalty. In a C^t of law if a deed is executed with a penalty & the condition is broken the penalty is considered as a debt which may be recovered in law.

A C^t of Equity considers the condition as the real agreement between the parties and considers the penalty in terrorem to compel the performance of the condition.

(8) Powers of Chancery

The case is the same in the case of mortgage the Ct of Equity view the mortgage in the proper light as a penalty. a Ct of Equity considers a penalty as agt conscience —

Relief agt penalty then forms an important ground of jurisdiction in a Ct of Equity.

2 P.M. 545 In the case of trust, Ct of law & Equity proceed
558.9. upon diff't rules of justice. in law trustee may
3 Bl 439. hold the land forever. in equity the trustee may
be compelled to convey to the beneficiary trust.

Besides the grounds of jurisdiction spoken of by Bl
1st a Ct of Equity may enforce justice where
positive law is silent this a Ct of com: law
cannot do.

11th 3. 103. 2nd a Ct of Equity may abate the rigour &
supply the defect of a rule of law where the
12th 3. 107. rigour or defect is a collateral or unforeseen
consequence of the rule.

Example of the fact a Ct of Chancery may stay waste by injunction the common law has made no provision whl requires this injunction & yet as the justice of the case requires it that Ct will interpose a remedy. — So a Ct of Equity will enjoin agt a marriage of a child or ward — positive law in both these cases is silent.

Example of 2d of Ct of Equity enforces marriage settlements ^{and marriage settlements agreements.} the rule of the common law is that agreements made between hus & wife before marriage are made void by the intermarriage. yet a Ct of Equity considers that this was a case not contemplated by the rule of law. The rule could not have intended to vacate such contracts when made in contemplation of marriage & of whh marriage was the considⁿ.

Where any hardship or injustice is a necessary direct & obvious consequence of a rule of law a Ct of Equity cannot abate its rigour or supply a supposed defect.

(10) Powers of Chancery - Specific performance

The power to decree the specific performance of
1 Bro 67. agreements is the most important power of a
15 Bro 27. Court of Chancery. This power is exercised
2 Rom 136. because the remedy at law is not adequate.
Latch 172.

This power has been exercised in Chancery since 14th
but not frequently exercised until 16th.

In what cases will a Co of Equity enforce the
specific performance of agreements? It is said that
15 Bro 67. Equitable jurisdiction in case of contracts
1 Atk 14. extends to all cases in which the subject, or the
1 Atk 14. parties are within the procep of the Co for this
2 Pal 689 Co acts both in rem & in personam

But this does not mean that Equity will enforce
every contract where the parties or the subject are
within the procep. of the Co. this rule is a
description of the circumstances in which a contract
2 Wms 477 may be enforced in equity & not a description
1 Wms 477 of the species of the contract which that Co will
2 At 1 enforce. That is this rule is true where the
Co have jurisdiction over the contract

or else has been maintained in Engl^d to compel the
conveyance of land in Penn. the decree in this case
acts in personam. it can't act in rem. Thus
in the case of Penn & Baltimore. in such a case
a Co of law c^d. not give judgment in ejectment or
such a case nor give judgment in trespass quare clausum
fecit. nor indeed give any remedy.

And if a covenant to convey land lying in Engl.
is being in a foreign country. after notice to the
tho' it does not appear the Ct on a bill will
make a decree in rem whh per se will vest the
title in the Plf.

Thus also in case of a mortgage of land in Engl.
where mortgagor resides in this country the
mortgagee may foreclose by a bill brought either
here or in Engl. in one case the decree is in rem
in the other in personam.

and mortgagor in such case may file a bill
to redeem either here or in Engl.

Anciently a Ct of Equity could decree only in 1 Fonb 31.
personam but now it can decree in rem in 2 Pont. 68. q.
the latter case the decree is a process to put 3 Atk 275.
the Plf in possession & a writ of assistance directed 37.
to the shff & if the Deft. refuses to deliver poss. 1 Atk 543.
the shff acts as under a writ of habere fac. 1 Vesey 454.

decree in rem commenced Jan 1.

1 Vesey 454
1 Fonb 31

(12) Powers of Chancery - Specific performance

When the decree is in personam it is enforced by process of contempt + sequestration + his goods. Vase 4571 is held in sequestration until the deft complies. Fort 31. with the decree. + he is finally liable to imprisonment ^{fine} but this can be done only when the deft is in the country where the Ct has jurisdiction.

15 Feb 88 Marriage settlement agreements are another class of agreements specifically enforced.
90. These agreements are void at law on the intermarriage
Cro Car 571. the Ct of Equity proceed now on the grounds that
Ct Sett 112. the rule of the common law did not contemplate
264. such a case. vide ante
"26 Nov 96 45"

1. Nov 41. It is an agreement in form of a bond for the making
1. Nov 43. of a settlement. a Ct of Equity will enforce the
2. PM 211 condition of the bond. for that Ct treats the
1. Nov 47 condition as a covenant. tho' it is in the form
Dm C 31. of a defeasance.

The Ct of Equity in this case looks at the substance of the bond.

Specific performance, Marriage settlement agreements,

If a settlement is made by the husband during coverture a Court of Equity will protect & enforce that settlement as at law it will be utterly void. Such a Court considers such a settlement as an agreement to convey for of conveyances executed as such are not within the jurisdiction of the Court. for such conveyances purport to carry the legal title. but in this case the conveyance does not carry the legal title.

Litt 5168.

Formerly where agreements were made between husband & wife during coverture they could not be enforced even in Equity unless there was an intervention of trustees but now agreements made during coverture without the interposition of trustees are enforced in Equity. The agreement must indeed be fair bona fide as indeed it must be in all cases to induce a Court of Equity to enforce a specific exⁿ.

Co Litt 3.

1506 945.

2 Vern 385

made during coverture without the interposition

3 O'Mm 337

of trustees are enforced in Equity. The agreement

must indeed be fair bona fide as indeed

1 Atk 270.

it must be in all cases to induce a Court of

1506 95.

Equity to enforce a specific exⁿ.

1 Vern 245.

2 Vesey 308.

1506 85.

And by the law of Equity the wife may dispose of property thus given, to her sole & separate use as a feme sole may

2 Vesey 91

665.

(147) Powers of Chancery. Specific performance

There was a decision in this state in 1804
1 Day 321. in whh the Ct held that an agreement between
hus: & wife was not binding. at least it
appears so from the report. but it has since
been decided that the English law is our
law. & the decision in 1 Day was founded on
the particular circumstance of the case —

What sorts of agreements will a Ct of Equity specifically
enforce?

1st on bl 139 Chancery will decree the specific performance of agreements
2nd on bl 141 & 6 falling within its jurisdiction & requiring equitable
16th cas: 67: 9. interference in those cases & generally in those cases
Ambl 406. only in whh a Ct of law will give damages for
1st A 2nd 327. non performance. if then a case is one whh will
not support a recovery of damages at law the Ct
of Equity will not in general interpose. but if the
case is such as that damages might have been
recovered at law the Ct of E will interpose provided
the damages are an inadequate remedy. &c.

Hence it is that a C of Equity will not in genl
enforce a voluntary agreement: not even a voluntary 1 Post 341: 2
agreement under seal, 1 Atk 10.

1 Atk 738.

1 Ves 74. 1150.

But at law if the agreement imports a consideration
the Dft cannot deny the consideration but in Equity
the Dft ^{in such case} may show that there was no consideration
even by parole. for this evidence merely instructs
the conscience of the Chancellor, whether he ought
to decree a specific performance, or whether he
ought to leave the Plf to his remedy at law.

But there are exceptions to the genl rule on
last page - on both sides. It is

now an exception to the rule that Equity will
decree a specific performance where damages might
be recovered at law for non performance.

The Equity will now decree a specific 1 Atk 359
performance where it w^d plainly be unconscionable 1 P M M 429
to leave it even tho' damages might be rec^d at law. 279. 282

Thus a bill brought for the conveyance of land
by a subseq^t bona fide purchaser ^{for value} with the notice
of the executory agreement will be dismissed
still in this case damages may be rec^d at law
from the vendor.

But if the subseq^t purchaser had notice Equity
w^d decree a conveyance from the purchaser to
the purchaser under the covenant.

or if the subseq^t purchaser was without value

(16) Dowers of Chancery. Specific performance

1 (17) m 528. But an agreement to convey real estate on valuable consideration & where every thing is fair will be enforced ag^t an intervening judgment creditor, for the decree is only a general one—

1 Feb 178. do again when a bill is brought ^{to compel a defendant to} accept a conveyance & pay the consideration Equity will not compel an acceptance if the Pl^{ff}'s title is under an encumbrance which cannot be easily removed still in this case damages may be recovered at law.

2 Mm 201
2 Pl^{ff} C 54.
2 Pl^{ff} C 34

1 Pl^{ff} 161. So also if one person covenants to sell lands belonging to another expecting that he can purchase the land. if the land cannot be purchased a Ct of Equity will not compel the specific performance of the covenant. the damages may here be reco^d: at law.

Powers of Chancery (Viz) Specific performance

But then no case in all Equity will decree the specific performance of agreements on all no damages could be recovered at law

This is the case in all marriage settlement agreements 2 Pr 616.
vide ante) all are rescinded at law but a 2574.5.7.
specific performance of them will be decreed in 2 PM 243.
Equity. 3 Atk 607
17 Feb 68.9

And the rule is the same in settlements made by husband during coverture with the intervention of trustees.

So again if one lends money to an infant and the latter expends in necessities in Equity the infant will be compelled to pay the value of the necessities 17 Feb 68.
to the lender tho at law damages could not be 500d 368.
recovered. 2 Pr 625.9

On the ground that it is altogether equitable 1 PM 578.
& that it assumes a jurisdiction of infants. 433 558.

(16) Powers of Chancery. Specific performance

When the obligee in an assigned bond
after notice of the assignment takes a release
from the obligee a Ct of Chancery will compel
the obligor to pay to the assignee, tho' at
law the assignee cannot recover. Here the principle
is that the choses in action are not at law
assignable yet in equity the beneficial interest
is assignable & that Ct will protect the beneficiary
interest.

For authorities see vide Bills of exchange.

In Court an action on the case will
lie agt the obligor,

2nd Bill.

When an agreement is made by the act of the
Ct itself that Ct will enforce the agreement tho'
no action at law is lie on it. Thus a
judicial sale of land &c. In this case a Ct of law
will not interfere because it is the act of another Ct
& Equity therefore must support the agreement.

When the condition of a bond is destroyed at law by the union of the right & obligation 10. Mod. 575. in the same person the Co will enforce the bond or the condition of it in favour of Creditor 2 Port 625. 4. Thus it becomes Ex. &c of the obligee in a bond of which the Ex. is obligor. tho' at law the bond is extinguished yet at law in Equity the bond is good in favour of Crs. The same rule holds of other contracts besides bonds.

But in Court the bond in this case is not extinguished in Equity in any case even tho' there are no Crs. - Bacon & Shepard Supreme Ct. of Conn. Litchfield June term 1826.

If the recovery of damages at law can be had 1. Tonb 28 & is an adequate remedy Equity will not in general 139. decree a specific performance. for there is no need of Equitable jurisdiction. This rule admits of no exception unless where modern rules of law give an adequate remedy & where the ancient rules of law did not afford an adequate remedy. For the introduction of new rules of law shall not oust the ancient jurisdiction of that Court.

Powers of Chancery. Specific performance,
(20)

What are those contracts in which the remedy at law is inadequate? This depends in a great measure on the subject matter of the contract as being real or personal. & so far as equitable interposition depends upon the subject matter of the contract the genl rule is this that a C of Chy will enforce the specific performance of no other contracts than such as relate to real property & such contracts the C will genlly carry into specific performance. This is genl but not universal. The reason is that where the contract is concerning real property a recovery in damages is not in genl deemed an adequate remedy.

There are cases in which justice requires a specific performance of contracts relating to personal property & in such cases a C of Equity will enforce the specific performance of the contract. But in genl the remedy at law on personal contracts is deemed adequate.

2 PM 305

3 Atk 383

1 Vern 119

1 Co: ca 393

1 Vern 281

2 PM: ca 217.

the point - mixed with the damages a C of Equity will
decide the specific performance of a contract relating to personally
the contract is if A brings an action at law agt B on a personal contract 2 Pont 6215
contract & B brings a bill in Equity charging A with fraud. A 1 Eq: ca 17
may bring his cross bill in Equity denying the fraud praying 1 Bac 69. 526
that the C will decree the specific performance & if the fraud
is not proved or is disproved. the C will decree the performance
for as the Def at law is driven into equity on a ground of
charge of fraud the C of Chancery thinks it is reasonable
that the Plf at law sh^d have his remedy where he is thus
reluctantly brought. But in this case the Chancellor
cannot assess the damages but must direct
an ipse quantum damnicatus at law to be
tried by a jury - But in Court the Chancellor
appoints commissioners to determine the damages.

A. if Plf files his bill in chancery on a personal contract 2 Pont 6215.
& the Def does not demur. he tacitly submits the bill to the C.
case to the C. & that C will decree. the Def in this
case is supposed to answer without demurring the
proper way of objecting to the jurisdiction of the C.
by demurring.

Powers of Chancery, specific execution,
(22) If an agreement respects an interest in lands (or stipulates the performance of some specific act) on a bill filed a
1 Fonb 278. C of chancery will decree the specific performance.

139. 359.

2 Ponb 619.

1 Pms 282.

2 Ponb 619 If an agreement concerns the personalty on one side & realty on the other the C will decree a specific performance on a bill filed by either party. & this is almost always the case. The agreement is seldom concerning the realty on both sides.

Thus if A covenants to convey for a consideration to be paid by B. A may file his bill & compel B to accept a conveyance & to pay the considⁿ.

For it is a genl rule that the interference of Equity must be mutual.

1 Pms 450. A genl covenant to convey lands of a certain value with any particular description of such lands will not be decreed in Equity to be specifically performed. For here the principle that the C considers the title as transferred from the time of the ex^y agreement does not apply. Besides here is no room for specific performance - what land shall the C order to be conveyed,

Gently he who prays for the specific performance
of an agreement must show in his bill either that
he has performed or is ready to perform his part
for if he will not or thru his own fault cannot
perform his part he cannot have a decree -

1 Fonb 688

1 Ves 87.

2 Pom 619.

Salk 112.

2 Freeman 35,

But the rule is diff^r in law.

this rule results from the discretionary interpretation
of the Chancellor

It is therefore a gentle rule that when a Def^t
has performed in part but is prevented by
something subject from performing the rest the
Plf is not entitled to a decree. for

1 Fonb 315

2 Pom 619-

Thus A agreed to pay \$1000 to B within two yrs
provided B sh^d marry C's daughter & settle
a certain jointure on her within two yrs. B married
but his wife died before the jointure was settled
B brot his bill for \$1000. but the bill was dismissed

Gibbs 218.

2 Pom 19.

B. married Skinn 287

Power of Chancery. Specific performance,

(24) But where the Plf having performed in part & being in no default for not performing the rest he is not left in statu quo. here equity
1 Eq. ca 70. will decree tho' the Plf has not performed
1 Forb 385. the rest. Thus where on an agreement between
2 Ven 210. the owner & freighter that freight sh^d be
2 Port 626 charged only on the homeward cargo & the
freighter had no cargo to bring home
& the ship came home without any cargo
The owners were entitled to & received
a compensation.

Hob 88. And where the Plf has been willing to perform
2 Bln 1312 on his part but has been prevented by the Def^t
47 R 761 the Plf is entitled to a decree. Readiness
Lick 112 in this case is equivalent to actual performance
Here the rule is the same at law as in Equity.

1 Nom 240. But a Co of Equity will not decree a written agreement
2 Atk 65. under seal which has been discharged even by parole.
220. & parole proof is admitted for the purpose of rebutting
3 P M 40. an Equity.

1 Br 64 201.

328.

2 Ves 299. Now at law this parole discharge w^d have no
Fall 79. effect whatever & in Chy it is admitted not
240. to affect the contract but to instruct the
conscience of Chancery whether it wd be equitable
to carry into specific performance such a contract
& it leaves the parties to their remedy at law.

Again where a party has permitted a claim to lie a long time dormant his delay will prevent a decree in his favour unless he can show some good reason for the delay. Such a delay is prima facie a waiver of the claim.

2 Jac 6260.

1 Fon 6221.

2 Ack 610.

2 P. Mm 582.

1 Fon 6354.

Hence where there was a marriage agreement on the part of the husband to settle lands within three yrs & the claim was not insisted on until several yrs after the three yrs were expired. on a bill for performance the husband insisted on the length of time but the decree was made ag^t the husband it being shown that the claim was delayed because the husband was in business which required all his capital.

But no length of time will prevent a person from taking advantage of a fraud. or from insisting on the ex^t of a trust. Fon 6

The Plfs omission to perform his part precisely at 12th mo the time fixed if he is ready within a reasonable time after the time fixed is no objection. 4 Br. Ch 324. 1 Fon 6364.

But in a late case at law it is said that this rule of Equity is altered—

1 East 627

(26) Power of Chancery. Specific performance

Again when a party seeking specific performance has himself trifled with the contract & shown an unwillingness to perform his part he cannot in general have a decree. This is as it were a parole discharge,

2 P. 626. It is said that there is an exception to the general rule that the P. cannot have a decree in specific performance unless he has performed his part & shown a readiness so to do. in favour of the issue under a marriage settlement agreement for they are purchasers under the settlement & it is not their fault that one part of the agreement is not performed & cannot be performed. as to any duty to be performed they are third persons. And any non performance is a fraud upon them.

1 Ves 377:8. And the same principle holds with respect to
2 P. 628. a settlement made on the wife provided the wife is no party to the agreement.

There are many cases in which a Ct of Chancery will decree a performance as far as possible when complete performance is impossible—

1 Fon 609. 11

2 Dou 31.

3 Br 16339.

60 Litt 352

219. b.

2 R L R 721.

And this is the rule at law but not so much so
as in Equity. 2 R 254. 2 R Bl 163. 581.

As where complete performance is rendered impossible
by the law as by a subsequent statute,

Or by accident or by act of God. In each of these cases if the party wishes, he may compel a performance ci prais,

2 Br 1633

1 Do 448.

1 Eq ca 18

2 R. AC 319.

Plowd 384.

Again where one has a power to lease for 10 yrs and lease for 20 yrs now a Ct of Equity will support the lease for 10 yrs. the Ct will consider the lease for 20 yrs as an agreement to make a lease for 10 yrs and will therefore compel the lessor to make a lease for 10 yrs.

Amb 740

1 Fon 6202

Now such a lease at law w^d be utterly void

2 R 252,

It is a rule of law that when one conveys to a person for life remainder to the heirs of his body, a takes an estate tail. In executed agreements the rule is the same in Equity.

16099

1 Fon 6399.

5 R 516.

Fearn 25-

Powers of Chancery Specific performance

(28)

But in articles of covenant as to settle land on A for life remainder to the heirs of his body, a Ct of Equity construes the words differently, and will decree a conveyance to A for life only remainder in strict settlement. The Ct of Equity here construes the agreement according to the words & apparent intention of the parties,

2 Prae 641
15 Ca 892.
2 Vern 688.
2 P Wms 347.
1 Ves 38.
17 Feb 399
1 P Wms 622

The Ct hold that they may in conveyances give their words a differe construction because this construction is more according to the genl intent of the parties than the construction at law.

3 Atk 293
Tab 176.
2 P Wms 356 (ed)
2 P Wms 6242.

And the Ct has even gone so far that after a settlement has been actually made after marriage on an agreement made before marriage "to A for life remainder to the heirs of his body," as to set aside the settlement & make another after its own rule, i.e. to make a new settlement to A for life remainder in strict settlement. For this settlement is void at law,

And when there were such articles & the settlement made before marriage & expressed to be in pursuance of the articles the Ct held that it was not in pursuance of the articles & set it aside & made a conveyance after its own rule. But unless it was expressed to be in pursuance of the articles, not set it aside,

1 P Wms 123
2 Vern 688.
2 P Wms 347.
2 Prae 426.
1 Ves 233.
2 P Wms 356 (ed).

Above before remarks that a C of equity considers
 an executory agreement as executed from the time when
 it ought to have been executed which is the time of
 making the agreement. (unless some other time is fixed
 according to ~~some~~ opinions but the better opinion
 is that the contract shall always be considered as
 executed from the time of making it. For Equity
 regards the future transfer of the legal title
 at a time fixed as a mere formality - (post)

1 Fon 349. 59

413

2 Vesey 639

1 P. M. 710.

61.

Rob on F. C. 665.

667.

2 P. M. 656.

2 Atk 400

2 P. M. 420.

4. M. 290.

2 Br. C. L. 118.

1 Madd. 290.

6 P. M. 171.

This rule means merely this that that C. considers
 the right as vested in the purchaser from the time of
 contract made & considers the vendor as trustee for the
 vendee from the time of the contract made.

It follows that if money is articles or devised to
 be laid out in land Equity considers the money as
land from the time of the contract made & will
 carry the ^{money} land to the heir as land.

2 Vern 546. 312

1 Fon 413.

2 P. M. 683.

1 P. M. 532.

483.

2 P. M. 171.

3 P. M. 211.

Price in Ch. 543.

1 Vesey 175-96

Rob. F. C. 665-7.

Dowers of Chancery. Money articles

(30)

2 Vern 536.

585.

1 Forb 414.

Hence money thus article^d is subject to courtesy in the hands^t of the person who would have been entitled to courtesy in the land if the purchase had been actually made and his right may be effected in either of two ways viz. a C of Equity will compel the money to be laid out in land & settled on the husband for life remainder according to the articles. or the husband may receive the interest of the money during his life.

But in similar circumstances the wife is not entitled to dower. but in Comt & N.Y. she is entitled to dower. For the wife is not in Engl^d entitled to dower from an equitable estate,--

Dec m 632. On the same principle where there has been such
2 Douc 109. a devise or article of money. It will genlly pass
2 Vern 679. under a genl devise of real estate & in genl will
1 P M 172. not pass to a genl legatee. under the form all
3 Atk 254. my money &c
3 P M 221.

2 Pra 112. These rules obtain whether the fund to be paid for
2 Pal 686.7 land is distinguished from other, but the agreement
will bind all money & indeed all the personal property
of the covenantor

But Eq. does not consider money as land until the agreement to vest it in land is positive. If therefore one agrees that a certain sum of money 150nl 444 shall remain in trustee's hand until a convenient 2Vem 227 purchase can be had. here the agreement is not positive 3Att 255. If money is articulated to be invested 2Poul 84 in lands or securities the election must be made 1Vem 248 otherwise the money will be money. & he who is to make the election can have nothing under the contract

And land may be considered as money thus if the owner of land covenants to sell certain lands & dies without making a conveyance. the land will become money & the land will belong to the Executor in Equity. And the former rules hold & converso in these cases. 2Ves 639. 640. 15th. 1Fon 64144. 2Poul 83.

Another effect of this principle is that the property agreed to be conveyed is considered as conveyed from the time of the agreement made is at the risk of the vendor provided the vendor is guilty of no fraud or misconduct. 2Vem 280. 2Poul 61. 2Poul 411. 1Poul 612. 1Att 156. 2Poul 217.

contract but not law

This rule holds even though a future day is named for the execution of the conveyance

2 Att 400 - 1. 1. 270. 2 Poul 220. 1 Poul 220.

2Vem 280

2Poul 61. 25

2Poul 411.

1Poul 612.

1Att 156.

2Poul 217.

2Vem 280.

2Poul 61. 25

(32)

1 P.M. 61.

2 Dec 665.

Thus A owned a lease for 3 lives & B agreed to purchase but before the time of conveyance came one of the lives drops the rendue was held to bear the loss & was obliged to pay the whole purchase money. There a subsequent day was fixed for carrying into effect the agreement before that day the life

2 P.M. 217 *dupd* (Other examples.)

2 Nov. 65. 6.

2 Nov 677.

But where the agreement is not for a sale but merely for the right of preemption, this doctrine does not apply. for this is merely an agreement that another shall have a right of preemption. It is an agreement between A & B that they will hereafter come to some agreement concerning the property. Here even in Equity the title does not pass.

Decrees of Chancery (No. 3.)

But the money articulated to be laid out in ^{land} ~~money~~ is prima facie land yet if the party ~~who~~ ^{is} be tenet in fee simple of the land when purchased 1506 H13 the money will be money or land at the election 2 Vern 295. if the person entitled to the fee simple for the Rob 76.66 (pl) right of no third person can be effected by permitting 2 Pon 112. the money to be considered as money or as land. for if the land was decreed to be purchased the person entitled to the fee might immediately sell it & therefore the decree ~~is~~ ^{is} be negatory.

But if the agree^{nt} were thus that a sh^d purchase land worth $\text{£}1000$ & settle it on B & the heirs of his body or to B for life remainder to C. C or the heirs of B's body might claim that the money ~~is~~ be laid out in land. But in such a case is 2 P Wms 175 where the money is to be laid out in land to be 3 P Wms 222 (pl) settled on A in fee, if A does not make his election 3 Atk 526. to have the money as money it will be considered 2574 (pl) as land. for instance if A dies witht making an 10 Br 62 223. election A's heir at law may claim the money 238. as land. and the heir at law may retain the money as land or he may obtain a decree that the money shall be laid out in land. but if it should make a will giving this land money to C and describing this money as money wh^{ch} was articulated to be laid out in land &c. C will have the money & the money will pass by a will not executed according to the stat of fraud.

And in this case parole proof is admissible to show that A did in his life time elect to treat the money thus articulated as money. This is only rebutting evidence.

Powers of Chancery. • specific performance

(34)

This election may be shown by acts of the test
in fact or by words. Thus it may be shown
2 Pom 6115 by the personal representative that the test said
1 Pom 483 that the land sh^d not be purchased.

2 St 174.

2 Pom 647.

A want of Eq: on the side of the Plf is a decisive
objection to a decree in his favour where he prays

2 Vern 415 specific performance of an executory contract.

1 Eq 620 Hence want of mutuality in an agreement is a decisive

2 Pom 233H objection to a decree for specific performance.

Tho' at law damages in such case might be resorted.

Want of certainty is a sufft objection to
a decree for the specific performance 1 Eq 620.

2 Pom 233:4 2 Vern 415. Ex A agreed to sell to
B a manna for \$1500 less than any other
purchaser would give - Here the objection was
twofold viz uncertainty & want of mutuality.

How far a voluntary agreement will be specif-
ically decreed vide 1 Madd 326:7.

But if the agreement is originally mutual no
supervening want of mutuality will prevent a
decree for specific performance. Thus A agrees
to pay B 90 per cent for certain stock but afterwards
the stock fell to par. here it was held that A
sh^d pay the purchase money for the stock at
the time of the purchase was worth 90 per cent.

A & C agreed to convey a manor in considⁿ
of an annuity on him for life & C died
before the first instalment yet the heir was
held to convey the manor,

Waiver of penalties.

Generally a Ct of chancery will neither enforce a
penalty or permit one to be enforced & if one
files a bill on a contract which contains
a penalty he must expressly waive the penalty or the
bill is demurrable & will be dismissed.

A Ct of Equity considers a penalty
as unconscionable — But Chadwick says
that relief ag^t penalties is founded on the
its power to relieve ag^t accidents,

Equity will generally not suffer advantage to be
taken of a forfeiture or a penalty where the substance
of the contract can be obtained without the penalty.
Thus on a bond the obligor may file his bill
for relief ag^t the penalty on paying the condition
& interest & costs & will make an injunction
ag^t the obligee from suing on the bond at law

Principles of Chancery. Relief ag^t penalties,
(36) It follows then that where a compensation
can be made to a party claiming a penalty
by a clear rule of damages Equity will generally
relieve ag^t the penalty. Thus in a bond &
2 P. & B. 112.3 in a mortgage deed. So also if one gives
a bond or covenant with a penalty for an
amt. capable of being ascertained by any known
standard the Ct will relieve ag^t the penalty.
Thus a bond with a penalty for the delivery
of such a quantity of goods the penalty will
be relieved ag^t for the value of the goods can
be ascertained.

(37) But where the case is such as to furnish no
rule of damages the Court will not relieve
ag^t the penalty. Thus if lease covenants under
a penalty of forfeiture to not to assign.

If there is a rule of damages yet if by reason of intervening events no compensation can be made, as a complete substitute for the penalty a C of Ch will not relieve a penalty. Thus A agrees that unless he makes a certain jointure on the wife within two years he will forfeit the wife's portion. the wife dies before jointure made. It was held that the husband must forfeit the portion for the wife being dead no compensation is to be made for the jointure is not to be made.

1 Vern 58:9

1 Fon 638:7

2 Pom 620:5

207.

Again where one party voluntarily stipulates a favour to the other party with condition that unless the other party does such & such things the favour shall be forfeited. if these things are not done the favour is forfeited.

1 Vern 220

Barnard 46:1

Precedent 1100

1 Vern 406

2 Pom 10:3

For this is not within the principle on which equity relieves against penalties. It is not unconscionable. It is not oppressive. Ex Creditor agrees to take 70 per cent if paid on a day certain. & the day passes. The debtor must now pay the whole debt. - The thing lost is a mere gratuity. & here nothing more is now to be paid than natural justice requires, & therefore this is not strictly a penalty.

Powers of Chancery. Penalties

(38) Where Equity on one side will relieve agt a
1 Feb 1441. penalty contained in an agreement it will on
the other side enforce performance of the agreement
& the rule holds & converse,

It was formerly held that when there was a
1 Feb 1441. penalty in an agreement the party bound has
2 Dec 1336. his election in all cases to pay the penalty
Jacobs or to perform the agreement & this rule is
now distinct clearly according to the letter of the contract
yet Bts of Equity will now enforce the perform-
ance & not allow the obligor his election for
the object of the contract is clearly to secure
1 Feb 1441. the performance of the condition. This rule
1 Br 644 #118. holds whenever the penalty appears to be
1 Port 171. a mere security for the performance of something
Doug 431. collateral, a Bt of Equity will on the one
hand relieve agt the penalty & on the other
enforce the specific performance of the con. l.
for the condition is regarded as evidence of
an agreement to do the act, contained in the
condition

4 Burr 2288 This relief is given by an injunction
2 P Wms 1. that the obligee shall not, on receiving pay^t
10 Col 577. of principal inst & costs prosecute
2 Ves 528. for the penalty
2 Atk 371.

But there are cases in which the obligor has his election & may by paying the penalty free himself from all other obligation, such is the case where the penalty appears not to be security for something collateral but is in the nature of assessed damages and in this case equity will not relieve ag^t the penalty, nor enforce specific performance, - for the sum assessed is not here fixed in terrorem to compel performance.

3 Atk 395.
4 Bur 228
17 Feb 1842
6 Br Pl 417
H70.
1 Madd 39.
2 Atk 194
2 Br 346.

It is frequently difficult to determine whether a penalty is for the security for something collateral or whether it is in the nature of assessed damages. If A takes covenants to pay \$50 for every acre of meadow which he shall plough now in this case the lessee may plough & a C^t of Equity will not inform, nor will they relieve ag^t the penalty.

On the other hand where the penalty is in nature of assessed damages a C^t of Equity will not enforce specific performance.

1 Feb 1842.
2 Vern 119.
2 Cr 32.
4 Bur 228. 9.
1 Atk 227
232.

But suppose the contract of the lessee had been thus I hereby covenant that I will not plough meadow &c & then adds I bind myself in the penal sum of \$1000 not to plough &c. now this w^d surely be regarded as a penalty for the performance of something collateral & in this case a C^t of Equity w^d forbid the lessee to plough & if there were any assessed damages the lessee w^d be relieved ag^t the penalty.

1 Feb 1842
2 Ves 328.

(40) Powers of Chancery Penalties.

Whether a rep sum to be paid on breach of a condition or non performance of an agreement is to be considered as assessed damages or as a penalty strictly speaking is to be determined from the intention of the parties as collected, from the whole agreement.

St Com: law breach of condition entitles obligee to recover the whole penalty.

But from the earliest periods our Co of Common Law relieve w^g penalties by reducing down the penalty to the real damages.

14 Bl 13. And by the English Statutes 8 & 9 Wm 3 & 4 W 5 c 14
1 Bac 544. Where an action is bro't to recover a penalty
3 Bac 691. a Co of Law will render judg^t for the damages
Oblig^r: actually sustained.

Coit 357.

2 Ld 341

2 Ch 155. The English Statutes do not extend to all penalties
Lams. 25.6. but our St does extend to all penalties wh^{ch}
17 R 126. may be relieved w^g in Equity vide Coit broken

Tho' a Ct of Equity relieves agt penalty it frequently ascertains the damages by directing an ipse quantum damificatus at law.

1. 5th 442.

2. 1st 624.

Where the damages can be ascertained by computation there is no need of this ipse at law.

A Ct of Equity cannot relieve agt a forfeiture incurred by the non performance of a condo precedent. This cannot properly be called a forfeiture for the estate never vests, in case of a condo precedent, 1. 4th 412.

Setting aside agreements.

This Ct has the power of doing this by acting in rem or in personam, Equity will often refuse to decree the execution of an agreement unless it wd not set aside on a bill filed for that purpose. The reason is that the interposition of Equity is discretionary. Thus the single fact that a contract is a hard one at the time is decisive agt decreeing its performance but this alone is not suff^t ground for setting it aside. 2. 1st 643. 2. 5th 152. 2. 5th 152. 1. 3rd 116.

Powers of Chancery, Setting aside agreements.
(42) In all cases indeed where the Deft can rebut the Plf's equity that he will refuse to decree the agreement, for the interposition of the Ct is discretionary.

20 Mm 203 But fraud in obtaining an agreement is a sufft
3 Do 290. ground for setting the contract aside.

2 Pom 145.6 In If the contract is such that a Ct of
Rob 20 526 law w? consider it as void w? Equity interfer
530.

If a Deceit is obtained by fraud Equity will
not set it aside but leave the matter to
Madd, be determined at law. But it seems that Equity
has concurrent jurisdiction in all frauds except that of fraud in

2 Atk 324 And tho' unreasonableness is not per se a sufft
2 Ves 627. ground for setting aside a contract yet that
17 on 116 with other things may furnish evidence of
2 Ven 402. fraud.

1 Ven 465. Thus gross inadequateness of price with the
1 Br Bl 176. facts may contribute to presumption of fraud

Talk 411. But imposed hardship & oppression constitute a ground
Talk 449. of relief in Equity distinct from that of fraud
2 Pom 645. & for that cause alone a Ct may set aside
88. 163. a contract.

2 Ves 152. Thus a contract obtained ^{tho'} by fear tho' not unlawful
1 P M 727. to legal effect.

3 Do 244. Thus a contract that interest shall become principal at
the end of every year For here it will be presumed that
one party was in the power of another & took a
that advantage was taken & hardship imposed

Such agreement fully ratified is good

When an oppressive agreement is also unlawful
they will a fortiori relieve agt the agreement but
only in favour of him who is not party 2 Boue 46
criminals. Thus in case of Usury the party Tall 31.
agreeing to pay unlawful interest is not party
sinner. But in Equity if a party applies to
be relieved agt Usury he will be relieved on
paying principal & interest. but at law on
the plea of Usury proved the whole contract
is void. The reason of the rule in Equity is that
the bill prays to be relieved from the usurious part of
the contract. the interposition of the chancellor is
discretionary he may therefore impose terms on the
applicant, & the terms here imposed are reasonable
for the applicant justly owes the debt & lawful interest.

But when the parties to an unlawful contract are both Comp 200
deemed guilty chancery will interpose for neither at least Tall 41.
Equity will not interpose beyond the provision of 2 Boue 150
positive law. 1 East 98

Powers of Chancery. Setting aside contracts,
(44) And any unfairness on the part of the Def will
prevent a decree in his favour. "the Def must come
Veru 227. with clean hands"

229.

3d Hk 353.

2 Voul 221.

226.

1 Br Ch 440 And with regard to unfairness suppression veri is
Proc in Ch 539 equivalent to suggestion falsi. Thus where a bill was
Rob. & L 524. brought to compel performance of a purchase when
531. the rent was stated truly, but some necessary
repairs were not stated.

2 Pol 225 And in some cases where there has been some
196 misconception, tho' no deceit, a C of Eq. will
2 Br Ch 326. refuse to decree a performance. & will in some
cases set aside the agreement.

2 Voul 196. And a mistake in fact is in many cases a
Moulty 364. ground not only for refusing to decree a
+ Vis 949. performance but for setting aside an agreement.
1 Madd 324. But mistake in law will have no effect. one
exception where a title to an inheritance was
in question between an elder & a younger brother
(case of the school-masters) but no equity will
a contract will not be set aside for mistake
in law.

But if there is a mistake in a point of fact
whh fact was the moving cause the sim qua non
of the agent the contract will be set aside.

1 Ves 400

This mistake supposes no fraud on either side.

2 Pw 196

Ex The object of one party is to sell & of the other
to purchase a mill seat. if there is no water
power the agreement will be set aside.

The compromise of a doubtful right is a good consid
eration if being fairly made tho' it can afterwards
be shown to the C. that the entire right was in
one party.

1 Pw 726

1 Atk 10

1 Pw 142

2 Pw 200 &

This case supposes something of this kind A owns
a piece of land B claims it. it is doubtful to
both what wd be the event of a suit. they therefore
compromise. now this agreement is good for the
very doubt is a consideration & they knowingly
enter into a bargain of hazard.

2 Atk 587

592

Agreement ~~and~~ obtained by coercion tho'
not amounting to legal duress will not only be
not decreed but will be set aside. and
undue influence tho' not amounting to coercion
is a sufficient ground for setting aside an agreement

1 Pw 111

2 Pw 160

187. 264

Powers of Chancery. Setting aside agreement
(46) But a person cannot set aside a contract
in Equity on the ground that it was obtained
by parental influence unless it can be shown
that such influence was unconscionably ex-
ercised. for it is a civil rule that fear arising
from due & proper respect to such a relation is
never a sufft ground for setting aside a contract.

3 Pmm 1306 Intoxication in one of the parties is not
per se a sufft ground for setting aside a
contract but if the intoxication was produced
by the practice of the other party and advantage
taken of it the rule is difft. so if unfair
advantage is taken of one's intoxication the
contract is void not on acc^t of the intoxⁿ
but for fraud. and ~~tho'~~ the old rule may have been
different the law now is that the contract of one, benef^t
by intoxication, of his reason is void at law as well as in
Chancery.

3 Pmm 124 Imbecility of mind when the party is legally
1 Pm 50. compos mentis is not a sufft ground for
setting aside a contract but such a fact is
sometimes a suspicious fact and accompanied
with indications of fraud & unfairness may be
a reason for setting aside a contract.

Agreements intended as or operating as a fraud on third persons are illegal & are set aside both in law & in Equity. . Co A contract made between a ship master & a stranger to defeat the interest of the owners. — At law indeed the contract is not set aside but when an action is bro't on the contract a ct of law will give judg^t ag^t the Plf,

1 Eg. ca 88
2 Don. 165
176 185
1 Vern 348
412. 475.
1 Ves 375.
Robt. 538:9

1 B & P 95. 21. 2 J R 763. 1 H & L 656. 7. 1 H & L 322. 4 T R 166.

And such contracts cannot be ratified. for if it could be ratified it w^d still be a fraud on third persons. a party can indeed waive for himself a rule of law intended for the benefit of himself. but he may not waive such a rule when intended for the benefit of third persons.

1 Vern 602
475.
1 P & M 496.
3 P & M 75
2 Don. C 176.

These cases frequently occur in marriage settlements Thus the husband agrees to return part of the property settled on him and his wife for the sake of deceiving the wife or her friends. the agreement to return the property will be set aside but the property will be the husband's.

Marriage brokerage bonds are always set aside in Chancery because their tendency is to produce fraud on third persons.

1 Foul. 245-
1 Poul. 174.
190.
1 Bam. & H. 5.

Power of Chancery. Setting aside agreements, & heirs,

(48)

And contracts with heirs apparent for their expectancies are always set aside in Equity, even tho' the heir be of full age & tho' the agreement might be beneficial to the heir. If such decrees are contrary to the policy of the law.

167

1 P. M. 310. The rule formerly was to set aside only such agreements as were prejudicial to the heir but not so now.

2 Do 292

2 Ves 125.

2 P. M. 181

3 P. M. 292. And such agreements have been set aside after they were carried into execution, even where it was so in obedience to a former decree in Chancery.

2 Ves 144.

2 P. M. 183.

2 P. M. 181

1844.

2 Ves 159.

1 Wil 320

1 P. M. 320.

But if the original contract is fair & is freely ratified on full information & then after he has come into possession the agreement will stand.

3 P. M. 441

But at law a deed of conveyance with covenant of seizin must bind him for he is estopped to deny that he has title when he made the deed. But at law if the covenant is expi-ry & it appears on the face of the contract that the vendor was a young heir the court will be void.

Powers of Chancery (V. H.)

It is a genl rule that an agreement to do any thing binds to abolition injustice inequity & a Ct. will not decree its specific performance. And 2nd 259. probably in many cases would be set aside 2nd 238. tho' there is no case whh goes so far.

Kind extensive head of equitable jurisdiction 3 Bl 54
formerly set-off but now by Stat 2^d 470. 123.
1st Sec. II. Set-off may be made at law, the Ct. 456.
left may plead a debt due from the Plf. to himself. the head of equitable jurisdiction 1 H Bl 67.
is done chiefly in way in Eng. C. But in Court. 60. 16.
We have no such statutes. Set-offs are therefore "unimpaired."
have to be decreed in Equity if at all.
and in Court. a similar Statute now exists.

In this state Equitable jurisdiction is in the County Ct. & Sup. Ct. if the matter in dispute has not exceeded \$335. the C. Ct. has original jurisdiction and if a bill is brought to set aside a judgment rendered in the Sup. Ct. or concerning a cause pending before the Sup. Ct. the Sup. Ct. has original jurisdiction whatever be the sum in dispute.

In England an appeal is made from Chancery to the house of Lords but in Court a writ of error may be brought & carry the question from the County to the Sup. Ct. & from the Sup. to the supreme Ct. (by Statute).

(50.)

Injunctions.

An injunction is in the nature of a prohibitory writ restraining a party from doing what w^d be at injury ag^t ^{conscience} equity or justice. Where a party is commanded to do something the decree is called an order.

3 Bac 172 The most usual injunction is that intended to injoin restrain a party from proceedings at law so that where a party is proceeding at law & where at law he might recover yet if there are equitable reasons ag^t his ^{proceeding} proceeding at law an injunction issues ag^t proceeding at law & of the bill.

6 Col 16. But Equity can never issue an injunction to stay proceedings in a criminal case. for Equity has no equitable criminal jurisdiction. The only offence w^{ch} that Ct can punish is a contempt. And if a Ct of Chy sh^d interfere in a crim^l case the Ct of B.R. w^d protect any one who sh^d proceed contrary to the injunction.

1 Br 657 A Ct of Equity may injoin a tent not to commit waste in favour of remainder men and reversioners.

1 Fon 629:30

Moff 124.

1 Eq. ca 226.

Pl 127.

Injunctions ag^t Waste

An injunction to stay waste may be granted in every case where an action of waste w^d lie at common law & in various other cases as 1 Vern 23. an injunction may be granted to stay waste 3 Atk 44. in favour of one who has not the immediate 723. remainder or reversion for this can be no 3 Bl 227 injury to the intermediate remainder man.

A mortgagee may have an injunction to stay 3 Atk 723 waste ag^t mortgagor. for the mortgagor has no power to diminish the value of the security & tho' the mortgagee may recover possession by judgment yet he needs a more speedy remedy.

On the other hand an injunction may be had 3 Atk 723. ag^t the mortgagee in possession. in the case of this unless he will apply the value to the debt and probably in case of destroying buildings an absolute injunction. But in this case no action at law w^d lie,

Injunctions agt waste

(32)

If tenant withl impeachment for waste is about to commit or is committing more waste waste he may be enjoined. as from destroying

1 Van 23. ornamental trees. not timber.

2 Amb 107.

2 Br 618 q.

3 Atk 215

1 Ves 264.

2 Vane 738. And such a tenant may be compelled by decree to repeal 45 H. repair waste of this kind already committed. }
10, 200 400 tho' no remedy exists at common law

And an injunction may issue agt the person having the legal inheritance where he is more truster.

10, 200 221. And an injunction may be granted agt tenant in tail after possibility &c for attempting unreasonable waste

Injunctions ag^t Nuisances

So an injunction may be issued to restrain nuisances of a permanent nature, as to prevent one's building so as to obstruct ancient 2Vo, H52 light. an action here indeed lies at law, but 1Ves H53 the preventive remedy afforded by Chancery is better.

So an injunction will lie to prevent one from practicing an unhealthy & noisome trade near the house &c of another,

Again an injunction may issue to prevent 17ton 29 a person from building on another's land until 3Bac 174 the question of right is determined.

In these cases the injunction issues immediately on affidavit but if the right is determined to be in A the injunction is made permanent but since the injunction is dissolved.

With regard to nuisances injunction will be 3Ath 750.
granted only ag^t common law nuisances 2Roll 139.
140.

Injunctions, Writs of Chancery

(57) And an injunction is now granted to restrain ordinary trespasses for for these the remedy at law is deemed adequate.

3 Atk 21

Penalties

3 Bae 696.
"Oblig."

Where a stipulated sum in the form a penalty is only in terrorem a Ct of Equity will grant relief by (ante) ~~granting a bill of peace~~

And an injunction will lie to stay proceedings at law until a bill of discovery shall be filed & an answer made by the Deft in Chancery when the party may make use of it at law.

Decies 261. Injunctions are sometimes granted to establish the prevailing party's title when harassed by a great number of suits in ejectment. this is sometimes called a bill of peace. There formerly was some doubt whether Equity had a right to grant an injunction in such a case. And then came the case in which an injunction similar to this can be granted — This injunction is always a perpetual one.

1 Vern 156. Injunctions are sometimes granted to quiet a person in the possession of an equitable estate agt a person having the mere legal title.

3 Atk 232.

Pann 12.

Str 404.

1 P 112 676.

1 Vern 308.

3 Atk 481. q.

¶ Injunction may be granted to prevent a multiplicity of suits in other cases than in exemption. Thus where several tenants of a manor claimed each for himself a right to a fair, for at law this case might be determined indeed but not witht as many suits as there were parties but in Equity it may all be determined in one suit.

Milford 4. 104
127. 8.

1 Vern 32
308. 266.
Prec in Ch
261.

1 Atk 282.

2 Atk 484.

3 Bl 438. 9.

And thus also where there is a question of boundaries between a dozen parties —

¶ While a suit is pending in the ecclesiastical court 1 Sid 179 between several claiming to be an Exor. or adm^r an injunction may issue to prevent any of the claimants from intermeddling with the estate until the question is determined in the prerogative Court. 1 Keble 683.
Ray 93.
2 Bac 410.
Exor. d 12. 15.
or 12.

¶ This Ct will grant a provisional injunction to stay proceedings at law on suggestion of fraud & undue influence in obtaining the bond &c until the question of fraud can be investigated in Ch. and if it is found that the bond was fraudulently obtained this injunction is made perpetual, contra it is dissolved. — In w^{ch} Eq^y do this unless the fraud is one which cannot be tried at law or unless a discovery is sought or something of the kind for the two Ct having concurrent jurisdiction the Ct which first gets the case has a right to proceed unless &c at supra.

Powers of Chancery. Lit. any property,

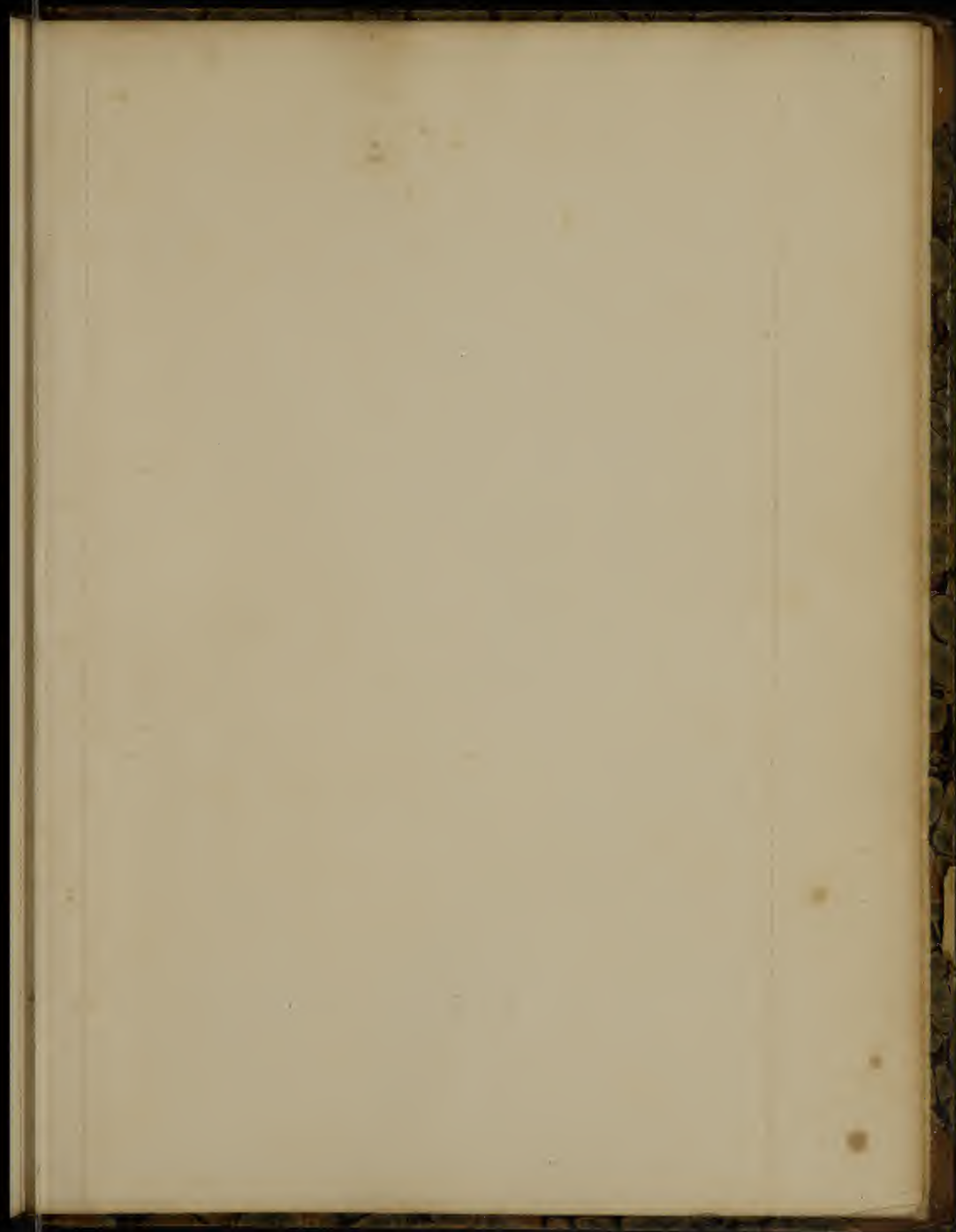
(56) Injunctions are frequent in favour of authors to restrain third persons from publishing their works. and on the same principle an injunction may issue in favour of any patent right & new inventions.
Lamb 164.
1 Forb 30.
Melliff 124.
1 Vern 120.
295. 127.

Since the St of Am. literary property is secured to the author. formerly actions of law were never brought the only remedy was supposed to be in Chancery but it is now settled that at com. law (in the case of Miller & Taylor) the author of any literary work has the sole right of first printing it and that he may maintain an action on the case ag^t any one who violates this right by printing the work without permission of the author.
9 Judges ag^t three
2^d question was whether the author by publishing one edition loses his exclusive right of printing it was decided that he did not & that no person has a right to print from the first edition.
Judges 9th four
3^d Question was whether this common law remedy by action was taken away by the statute. This was decided that it was by 6 to 5. but Lord Mansfield was the other way of thinking but did not vote. because he decided the case in B.R. & in B.R. it was decided that the Ch. action is not taken away by the Stat. i.e. that an author not complying with the St. may sue at C.L.
We have a Stat. similar to the St of Am. enacted by congress.

(Beckford & Hood 77 R.) The C.L. remedy by action remains for 28 yrs the time limited by the Stat. But by the case of Millan & Taylor it extends no longer

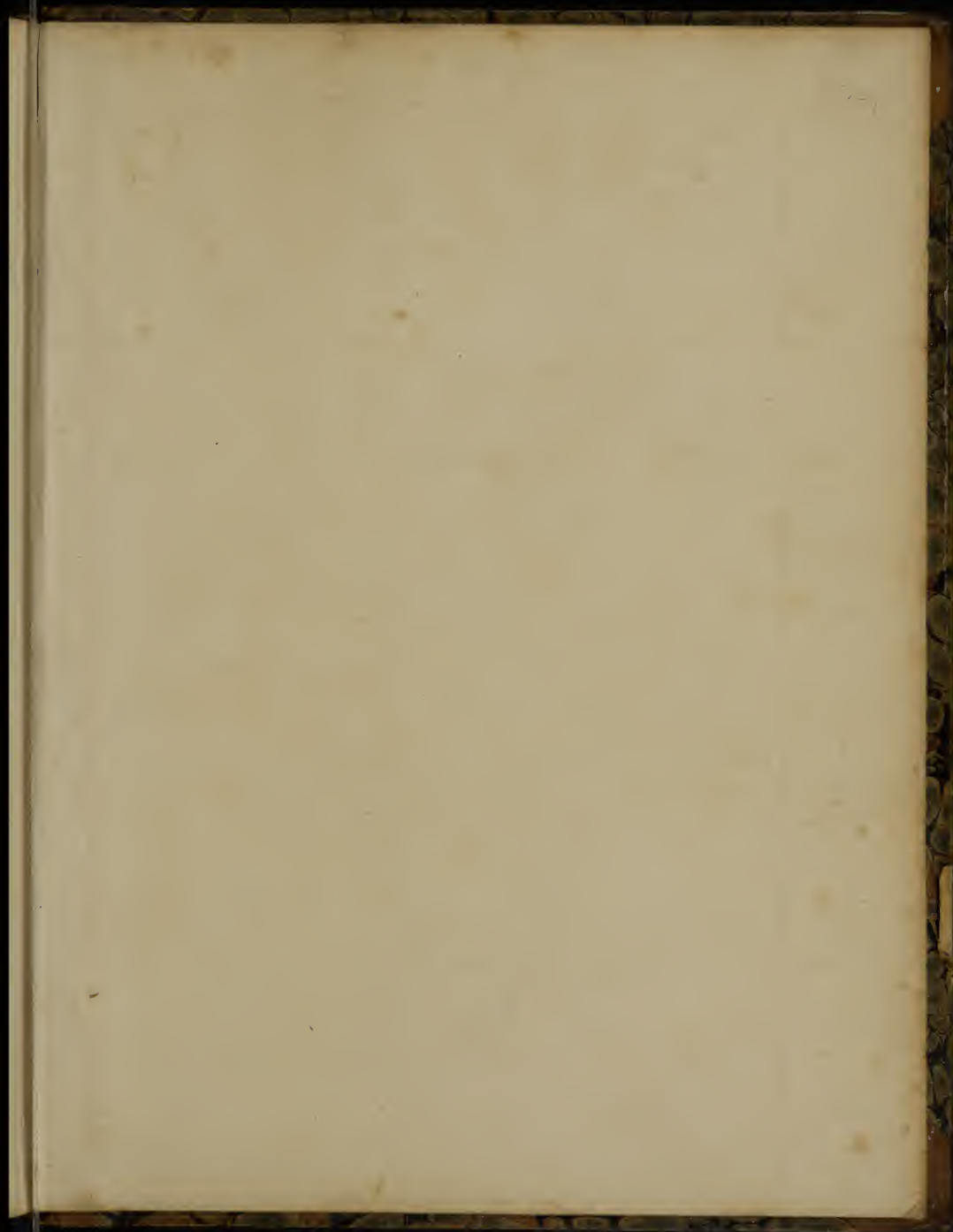
Where a *judg^t* at law by reason of any thing
superior ~~ought~~ ought not in Equity to be *Compulsory*
enforced & where there is no relief at law *ch 30*
a *ct* of Equity will relieve *ag^t* it by *3c 4th 123.*
injunction - or by ordering satisfaction.
to be indorsed on the *judg^t* -

(58)

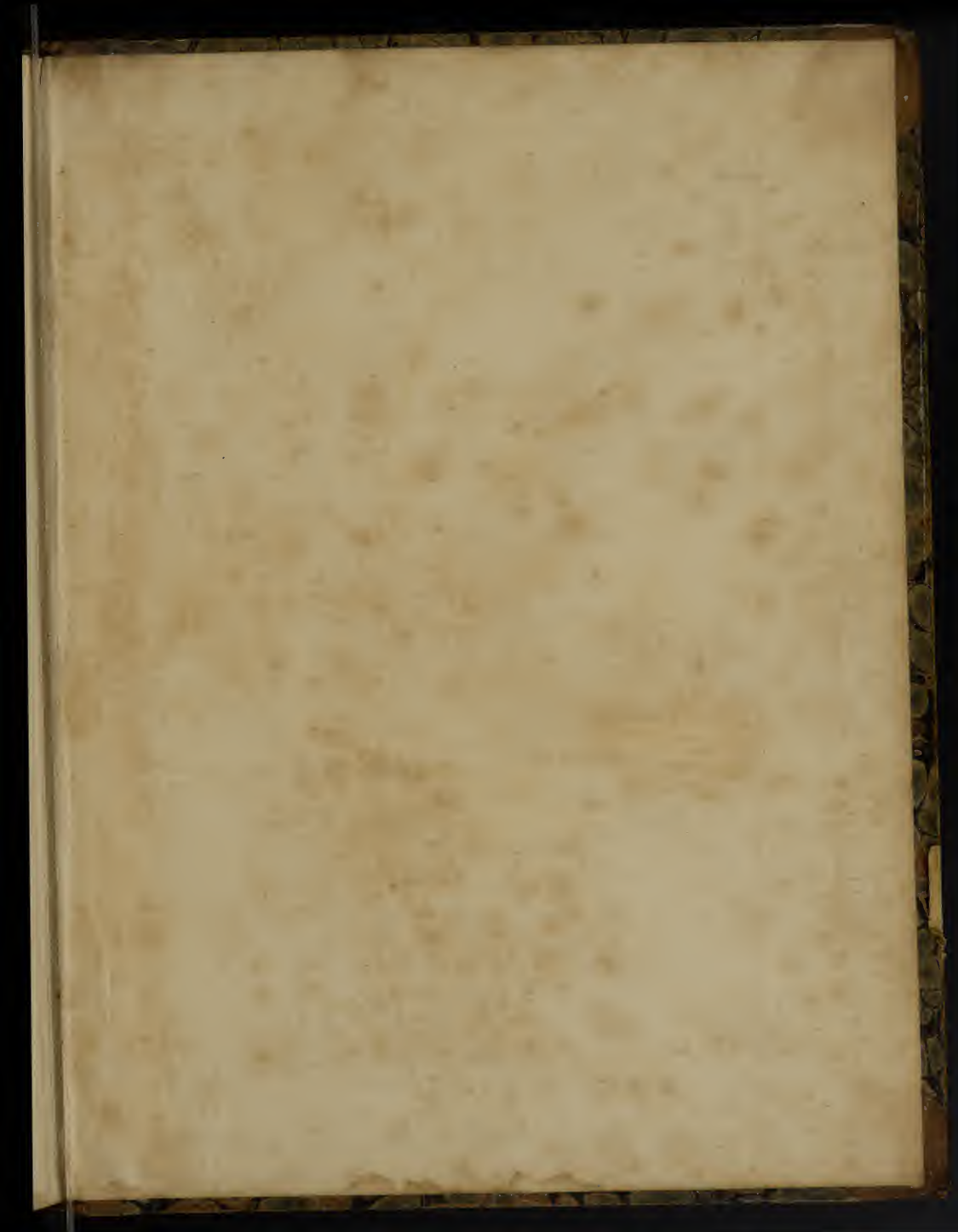


(90)

(62)



(64.)





WILSON'S
LECTURES

COLL.

IV.

WILSON'S